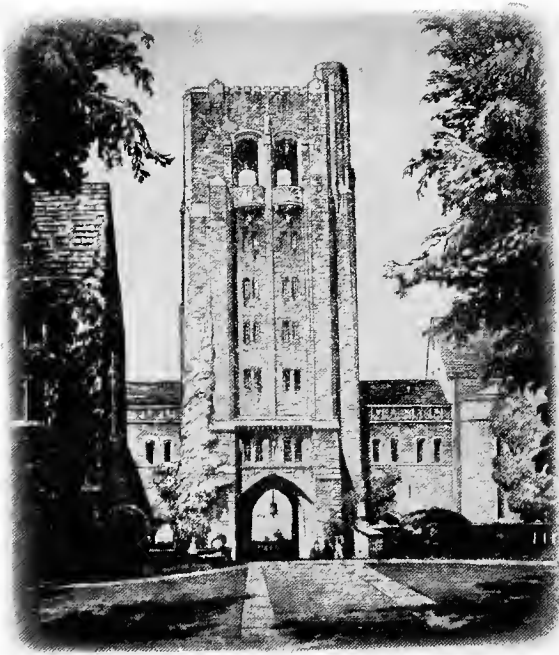






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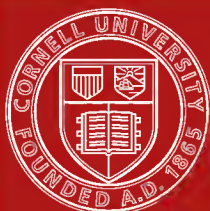
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ELEMENTS OF LAW

MARKBY

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66 FIFTH AVENUE

ELEMENTS OF LAW

CONSIDERED WITH REFERENCE TO

PRINCIPLES OF GENERAL JURISPRUDENCE

BY

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PREFACE TO THE FIRST EDITION.

I HAVE explained, in a place where it is likely to receive more attention than in a preface, the object of this book, and the use which I intend to be made of it. I have now only to add a word or two as to its form and its arrangement.

Its form is that of Lectures: and in fact a good deal of what the book at present contains formed part of a series of Lectures delivered to a small class of Hindoo and Mahommedan law students in Calcutta, in the year 1870. It would have cost me no additional trouble to divest the book of that form, but I have preserved it, for this reason:—it enables me to speak in the first person, and thus to show more clearly than I could otherwise do, how far I have depended on the labours of others, and how far I must take the whole responsibility of what I have said upon myself.

The arrangement is obviously defective; and this, in a work which professes to be a contribution (however small) to the scientific study of law, is a serious admission. But I do not think it possible to enter here into an explanation of the cause of this defect. I have indicated it very partially,

in one particular, in some observations made in the course of the work. What I maintain is, that when a work is written on English Law, which is complete in point of arrangement, the long series of labours which are now just commencing will have been brought very nearly to a conclusion.

LONDON, *October*, 1871.

PREFACE TO THE FOURTH EDITION.

I AM encouraged to hope that this book may still be of some use to students. It is true that there has been a slight tendency of late to underrate the importance of a close inquiry into the meaning of legal words and phrases. But this tendency will pass away: and the historical research which at present engages most attention will in the meantime have done good service. The recently published treatise of Pollock and Wright on Possession is a most valuable contribution to an investigation which I hope to see carried further, and it has, I feel sure, greatly gained by the historical inquiries which preceded it.

I am much indebted to Mr. Montague, of Oriel College, Oxford, and to Mr. Sheppard, of Trinity College, Cambridge, for the suggestions and corrections which they have sent to me.

OXFORD, *August*, 1889.

PREFACE TO THE FIFTH EDITION.



ENGLISH lawyers have always preferred authority to principles ; and they seem to regard principles with something like suspicion. Still I would advise students to make some attempt to discover principles : and this book is an imperfect endeavour to assist them in doing so. Even if they do not accept those which I suggest, they may still be led to the useful exercise of endeavouring to discover where mine are wrong. I do not shrink, therefore, from offering another edition to the public.

OXFORD, *May*, 1896.

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INTRODUCTION.

IN order that this work may accomplish, to any extent, its very limited object, it is absolutely necessary that it should be understood from what point of view of the study of law it is written, and what is the particular use which it is intended to serve.

For this purpose it is necessary to bear in mind that, until very lately, the only study of law known in England was that preparation for the actual practice of the profession which was procured by attendance in the chambers of a barrister or pleader. The Universities had almost entirely ceased to teach law; and there was nowhere in England any faculty, or body of learned persons, who made it their business to give instruction in law after a systematic method. Nor were there any persons desirous of learning law after that fashion. Forensic skill, skill in the art of drawing up legal documents, and skillfulness in the advice given to clients, were all that was taught, or learnt, by a process of imitation very similar to that by which an apprentice learns a handicraft, or a schoolboy learns a game.

This method of training produced its natural results. The last rays of learning seemed to be dying away from English Law with the old race of conveyancers and

pleaders; the only lawyers of eminence who were undisturbed by the bustling activity of the courts. The Chancery lawyers as a rule have retained a higher standard of culture than those of the Common Law Bar; and at both Bars there always were, and still are, to be found many men of eminent attainments in all departments of knowledge. But the law itself is, at present, little influenced by these attainments, and no one would venture to assert that they lie in the direct path of a successful professional career.

This is not the place to consider the effect of this decay of legal learning, and exclusively 'professional' training, either upon the profession itself, or upon the law, or upon the judges who administer the law. Nor is it the place to consider the causes which have led men to seek for a higher standard of legal knowledge, and thus to a revival of the demand for a systematic education in law, apart from professional training.

All I have now to take notice of is that, as a natural consequence of this demand, the Universities of Oxford, of Cambridge, and of London, are taking active steps to re-constitute the study of law as part of their course.

But it is only with the earliest, and what I may call the preliminary portion of a lawyer's education that a University has to deal. Towards imparting *directly* that professional skill of which I have spoken above, no University or Faculty of Law can do anything whatever. That must be done elsewhere, and at a later stage. I am indeed one of those who are persuaded that the skill in question will be at least more easily acquired, if not carried even to a higher point than it has at present reached, after such a preparation and grounding as a

University is able to give. But the only preparation and grounding which a University is either able, or, I suppose, would be desirous to give, is in law considered as a science; or at least, if that is not yet possible, in law considered as a collection of principles capable of being systematically arranged, and resting, not on bare authority, but on sound logical deduction; all departures from which, in the existing system, must be marked and explained. In other words, law must be studied in a University, not merely as it has resulted from the exigencies of society, but in its general relations to the several parts of the same system, and to other systems.

But it is not sufficient simply to take a resolution to teach law in this way. Experience shows that to establish a study on this footing we must have books and teachers specially suited for the purpose. At present, of the first we have scarcely any. I do not wish to say a word in disparagement of the books which are now usually read by students; I only wish to observe, that with two or three notable exceptions, which cover, however, but little ground, they belong to that period of the study of English Law which is now passing away, and that they are only suited to assist in the acquisition of professional skill; this being the object which master and student have hitherto kept steadily and exclusively in view.

The first two or three generations of those who take to the study of law after the new fashion will undoubtedly find this a considerable difficulty in their way. It must be many years before the scattered rules of English Law are gathered up and discussed in a systematic and orderly treatise; and for some time to come students of law will find themselves obliged to work a good deal with the old

tools. Nor does it follow, because these tools are not quite perfect, that they are to be discarded as useless. The actual state of the English Law on a variety of subjects is laid down with clearness, brevity, and precision in several elementary works; and though it is very easy to exaggerate the use of acquiring a knowledge of the existing rules of law; though this knowledge, standing alone, is only part of the skill of which I have spoken above, and will always be far better acquired in a barrister's chambers than in the lecture room of a professor; though this knowledge is emphatically *not* that which is the chief object of the preliminary training which I have now under consideration,—yet the existing law is (if I may use the expression) the raw material upon which the student has to begin to work. Being told that the law contains such and such a rule, it will be his business to examine it, to ascertain whence it sprang, its exact import, and the measure of its application. Having done so, he must assign to it its proper place in the system; and must mark out its relations with the other parts of the system to which it belongs. This will require a comparison with analogous institutions in other countries, in order to see how far it is a deduction from those principles of law which are generally deemed universal, and how far it is peculiar to ourselves. For this purpose some acquaintance with the Roman Law will be at least desirable, if not absolutely necessary; because the principles of that law, and its technical expressions, have largely influenced our own law, as well as that of every other country in Europe¹.

¹ This is the great difficulty of Indian law students. They can hardly be expected to make themselves generally acquainted with the Roman Law. But I do not think that it is at all impossible for them, even with

It is for students of law who occupy the position indicated in the above observations that this book is intended, and I repeat that it is absolutely necessary that those who use it should bear this in mind. I have presumed that they are in the course of making acquaintance with the more elementary rules of English Law; that they are desirous to understand those rules, and to know something of their origin and relation; not merely to use them as weapons of attack or defence. This difficult, but by no means uninviting inquiry is the one in which I have made some attempt to assist them.

a very slight knowledge of Latin, to obtain a useful insight into some of its leading principles. Being most desirous to render some assistance to this class of students, I have simplified, as much as possible, the references to the Roman Law.

ELEMENTS OF LAW.

CHAPTER I.

GENERAL CONCEPTION OF LAW.

1. LAW is a term which is used in a variety of different meanings; but widely as these differ, there runs throughout them all the common idea of a regular succession of events, governed by a rule, which originates in some power, condition, or agency, upon which the succession depends. General conception of law.

2. The conception of that law which we are about to consider—the law of the lawyer—is contained within and forms part of the conception of a political society. Fully to develop the ideas comprehended under the term political society would require a very long discussion. Nor is this full development necessary for our present purpose. Part of the conception of a political society.

3. For this purpose it is sufficient to observe some of its most striking features; and one that mainly distinguishes a political society from other associations of men is, that in a political society one member, or a certain definite body of members, possesses the absolute power of issuing commands to the rest, to which commands the rest are generally obedient. Characteristic of a political society.

4. It is desirable to observe that this, though a characteristic of a political society, does not belong to it exclusively, so as to serve as a definition of it. Though not, however, a distinguishing characteristic of a political society, it is a marked and conspicuous one; just as the habit of walking erect is a marked and conspicuous characteristic of the human race. But, in the same way as animals other than man have been known to walk erect, so societies other than political ones are known, of which the members are in the habit of obedience to a ruler, who is acknowledged to have the right to issue and to enforce his commands. The association called a 'family' has existed in many countries, and possibly still does exist in some, in such a form that, just as in a political society, the members of it are in the habit of complete obedience to its head, who has the absolute right to enforce, and actually does enforce, that obedience.

What commands issued in a political society are laws properly so called.

5. It is the body of commands issued by the rulers of a political society to its members which lawyers call by the name 'law.' There are only two small and very insignificant classes of the commands so issued which are not laws. Very rarely notifications in the form of commands are issued by the rulers of a political society, which are nevertheless not enforced: as, for instance, rules of rank and precedence in society, orders to wear mourning when a great person dies, and so forth. These are no part of law in our sense of the term. So also the rulers of a political society sometimes, but very rarely, address a command to a particular individual or individuals by name. Such occasional and specific commands are not properly comprised under the term law, which, as we have said, involves the idea of a general rule, applicable to all cases which come under a common class.

Laws declaratory and laws repealing laws.

6. Austin considers that there are two other objects included within the province of jurisprudence and called laws, which are, nevertheless, not commands; namely, declaratory laws, and laws which repeal laws. But, as it seems to me, every such law, if it is addressed by the sovereign one or

number to its subjects generally, if it is a signification of desire and is imperative, falls under Austin's conception of law: though it may only be a complete law, that is, a complete command, when taken in connexion with some other signification of desire. There are, no doubt, cases in which it is somewhat tedious to work out the ways by which a particular form of expression may be brought under this conception, but I am not aware of any cases in which the difficulty is insurmountable¹.

7. A special order of forfeiture of property made against a particular person as a punishment for open rebellion, though it may be in form an act of parliament, is not a law. Nor are the acts annually passed by parliament for appropriation of the revenue laws properly so called. Orders of forfeiture.

8. We thus arrive at a conception of the term law which may be summed up as follows. That it is the general body of rules which are addressed by the rulers of a political society to the members of that society, and which are generally obeyed. Summary of conception of law.

9. The aggregate of powers which is possessed by the rulers of a political society is called sovereignty. The single ruler, where there is one, is called the sovereign; the body of rulers, where there are several, is called the sovereign body, or the government, or the supreme government. The rest of the members of a political society, in contradistinction to the rulers of it, are called subjects². Sovereignty.

10. It is implied in what I have said above that there are other rules than those set by sovereign authority which are properly called laws: as, for example, the rules which the head Laws set by other than sovereign authority.

¹ Mr. Frederic Harrison gives a number of such cases in an article in the *Fortnightly Review*, No. 143, N. S., p. 684. But he adds (p. 687), 'I am far from saying that Austin's analysis of law cannot be applied to all these cases.'

² The Queen of England is sometimes called the sovereign, but this is only out of courtesy. The ruling power of Great Britain and her dependencies is the sovereign body, consisting of the Queen and the Houses of Parliament. The use of the word 'Sovereign' as a title of honour, not expressing exactly any political condition, is now very common in Europe.

of a household imposes upon the members of his household : and when we desire to distinguish between these laws and those laws which, being set by a sovereign authority, are the appropriate matter of jurisprudence, we call the latter by the name of positive laws¹.

This conception of law established by Austin.

11. This is the conception of law as stated by Austin in his lectures on the 'Province of Jurisprudence'; and I have only repeated his conclusions². Many of them rest upon arguments drawn from Austin's celebrated predecessors, Hobbes and Jeremy Bentham.

Austin distinguished law from morality.

12. What, however, Austin's predecessors do not appear to me to have fully apprehended, at least not with that sure and firm grasp which proceeds from a full conviction, is the distinction between positive law and morals. We find, for example, that Bentham, when drawing the line between jurisprudence and ethics, classes legislation under jurisprudence³, whereas, as Austin has shown⁴, it clearly belongs to ethics. Austin, by establishing the distinction between positive law and morals, not only laid the foundation for a science of law, but cleared the conception of law and of sovereignty of a number of pernicious consequences to which in the hands of his predecessors it had been supposed to lead. Positive laws, as Austin has shown⁵, must be legally binding, and yet a law may be unjust. Resistance to authority cannot be a legal right, and yet it may be a virtue. But these are only examples. Into whatever discussion the words 'right' and 'justice' enter we are on the brink of a confusion from which a careful observance of the distinction between law and morals can alone save us. Austin has shown not only what positive law is, but what it is not. He has determined

¹ Following the example of other writers, I drop the epithet 'positive' when the context makes it clear what kind of law is meant.

² See the first, fifth, and sixth Lectures.

³ Bowring's ed. vol. i. p. 148.

⁴ Lecture v. p. 177.

⁵ Lecture vi. p. 275.

accurately the boundaries of its province. The domain he assigns to it may be small, but it is indisputable. He has admitted that law itself may be immoral, in which case it may be our moral duty to disobey it; but it is nevertheless law, and this disobedience, virtuous though it may be, is nothing less than rebellion.

13. Austin's conception of positive law and of sovereignty does not depend upon the theory of utility discussed and advocated by him in his second, third, and fourth lectures; as the interposition of that discussion into an inquiry to which, strictly speaking, it does not belong, has led some persons erroneously to suppose. Austin was a utilitarian, and made an attempt (which seems to me to be creditable, though it has not been treated with much respect) to show that utilitarianism is consistent with the belief in a Divine providence. But in truth Austin's conception of law and sovereignty does not depend upon any theory of religion, or of morals, or of politics, whatsoever. It might be accepted by a Hindoo, by a Mahomedan, or by a Christian; by the most despotic of monarchs or by the staunchest of republicans.

Austin's
conception
of law not
dependent
on utility
or any
moral
theory.

14. Austin's conception of positive law has of late years been subjected to a good deal of criticism, chiefly on account of the conception of sovereignty which it involves; but it is not always easy to understand exactly what view is taken by the authors of their criticisms. They do not seem altogether to reject Austin's conceptions, still less do they make any attempt to substitute others in their place: and yet they seem anxious to prove that Austin's conceptions would lead to results which are false, or which, at any rate, the world would be unwilling to adopt. It appears to me that in what has been said there has been some misunderstanding of Austin's real position. It has been thought to result therefrom that sovereignty must be regarded as incapable of limitation; or, as one writer expresses it, that Austin's military training has inclined him to despotism. It is also suggested that if Austin's explanation of sovereignty be accepted the aggregate of powers

Criticism
of Austin.

which go to make up sovereignty cannot be divided; and, again, it has been supposed that he intended his conceptions to be applied to all governments in all ages. This is very surprising, because, so long ago as 1874, Sir Henry Maine, in two lectures evidently intended for this purpose, carefully pointed out the true object of Austin's analysis; that it was scientific and not political; that it is based upon assumptions and not upon historical facts; and that it rests not upon authority but upon logic. It is an abstraction, just as all the statements of mathematics and many of the statements of political economists are abstractions. At the same time Maine was careful to state that it is not upon that account to be laid aside as useless; on the contrary, that rightly viewed Austin's analysis is a precious inheritance to English students of law; 'that it is the only existing attempt to construct a system of jurisprudence by a strictly scientific process, and to found it, not on *a priori* assumption, but on the observation, comparison, and analysis of the various legal conceptions¹.'

Maine's
attitude
as regards
Austin.

15. The passage I have just quoted ought to be sufficient to make it quite clear what was Maine's own attitude in regard to Austin. It is well known to all those who studied law under Maine that he was from the first a warm admirer of Austin, and that it was largely due to his teaching that Austin acquired that wide and deep influence over English jurisprudence which up to that time he had not enjoyed. A considerable number of eminent men attended Austin's lectures, which were delivered between 1826 and 1832. In that year he published the 'Province of Jurisprudence,' which contains that portion of his lectures which has become celebrated. But no notice was taken of it until Maine insisted upon the importance of it to English students. It may be noted in passing that this did not cause any disappointment to Austin. As he says himself, 'So few are the sincere inquirers who turn their attention to these sciences,

¹ Early History of Institutions, p. 343.

and so difficult it is for the multitude to perceive the worth of their labours, that the advancement of the sciences themselves is comparatively slow; whilst the most perspicuous of the truths with which they are occasionally enriched are either rejected by the many as worthless and pernicious paradoxes, or win their laborious way to general assent through a long and dubious struggle with established and obstinate errors.' But Maine was precisely one of those 'sincere inquirers.' He was, however, fortunately, a great deal more. Besides being able as a jurist to appreciate the inestimable value of Austin's analysis as a basis for the philosophy of law, he had the historical and political insight which enabled him to perceive the precise limits of the task which Austin had set himself to perform. Consequently in Maine's writings, particularly in that portion of them to which I have already alluded, we have exactly that correction which a too exclusive study of Austin's rigid analysis necessarily requires. But there is not the slightest indication, as far as I am aware, that Maine ever hesitated about his acceptance of Austin's analysis and of its results. In the passage which I have already quoted, and in other passages both of his earlier and later works, he speaks in the most emphatic terms of their value.

16. But whatever may be the view which English or American lawyers may hold upon this subject, it is quite time that they should take up some definite position in regard to it. No one, at least no lawyer, is hardy enough to maintain that we can dispense altogether with precise ideas on such subjects as law, sovereignty, political society. And surely it is not enough to hesitate about accepting Austin's views. Those who do not accept them are bound to substitute some definite ideas in their place.

16 a. In one respect I think Maine's observations do not quite correctly represent Austin's views. He cites cases in order to show that the application of Austin's conceptions to them would be 'difficult or doubtful': and amongst them he cites the case of the Punjaub under the rule of Runjeet

Maxim
that what
a sove-
reign per-
mits he
com-
mands.

Singh, where, as Maine thinks, there were no positive laws at all, the people being governed by customs which were enforced by the quasi-domestic authority of a village court. All this is probable enough. But Maine then makes the somewhat remarkable suggestion that Austin would have brought such a condition of things within his conceptions of law and sovereignty by a resort to what he calls 'the great maxim' that 'what the sovereign permits he commands.' In the first place I cannot find that Austin ever gave expression to any such maxim as this. I suppose that the passage referred to is in Lecture i. p. 104, but the maxim which can be extracted from that passage is one of a very different character. What Austin there says is, not that everything which the sovereign permits he commands, but that a rule which the sovereign permits a judge to lay down, and which, when laid down, he will himself enforce, he must be taken to have commanded. But in this form the maxim could have no application whatsoever to the state of things described by Maine: we cannot, therefore, solve any difficulty by means of it. But what difficulty is there to solve? What Maine shows is that in the Punjaub, in the time of Runjeet Singh, the people were governed, not by positive laws, but by rules chiefly of a religious or semi-religious character, to the enforcement of which no regard was paid by the reigning monarch. But the existence of such rules neither affects Austin's conception of laws in general, in which many of them are included, nor does it affect his conception of positive law or of sovereignty, with which they are not concerned. In every state, even the most modern ones, there are rules regulating the life of the people, and even (as I shall show presently) entering largely into the decisions of courts of justice, which do not belong to positive law. In the Punjaub, in Runjeet Singh's day, the distinction between positive law and morals as drawn by Austin was certainly not recognised. I should be rather surprised to hear that it is recognised now. Moreover, it seems to me that Maine has overlooked

that the application to the case supposed, and to similar cases, of any such vague maxim as he suggests, would sweep all laws which men obey, whether positive laws, or moral laws, or divine laws, into one net, and thereby destroy entirely the distinction between positive law and other laws - properly or improperly so called, which it was the prime object of Austin's analysis to define and maintain.

17. Maine has more than once observed that Austin's conceptions when rightly viewed, that is, as legal, not as historical conceptions, have the appearance of self-evident propositions. This is quite true. But it does not at all follow from this that his labours were unfruitful, and I have already shown that this was not Maine's meaning. Self-evident propositions very often contain truths which it is convenient to ignore: and the common way in which they are ignored is by the use of ambiguous language, in which the contradiction is so artfully concealed that it takes much time and patience to detect it. The task which Austin set himself was the comparatively humble one, but the useful and even necessary one, of hunting out and exposing these contradictions, and making it impossible without wilful carelessness to repeat them¹.

Austin's analysis reducible to self-evident propositions.

17 a. Another criticism of Austin is as to his introduction into the conception of law of the element of force. It has

The element of force in

¹ 'In the confidence of private friendship, Mr. Austin once said of himself, that if he had any special intellectual vocation, it was that of "untying knots." In this judgment he estimated his own qualifications very correctly. The untying of intellectual knots; the clearing up of the puzzles arising from complex combinations of ideas confusedly apprehended, and not analysed into their elements; the building up of definite conceptions where only indefinite ones existed, and where the current phrases disguised and perpetuated the indefiniteness; the disentangling of the classifications and distinctions grounded on differences in things in themselves from those arising out of the mere accidents of their history, and, when disentangled, applying the distinctions, often for the first time, clearly, consistently, and uniformly—these were, of the many admirable characteristics of Mr. Austin's work as a jurist, those which more especially distinguished him.' J. S. Mill, *Dissertations and Discussions*, vol. iii. p. 207.

the conception of law.

been more than once observed that Austin gives somewhat excessive prominence to the element of force, which (it is admitted) is contained in every law, but which is very often so far in the background that it requires a good deal of effort to discover it. That the force by which law is sanctioned does remain very much out of sight is undoubtedly true, and the forms of legal procedure have been, as I shall show hereafter, affected by this circumstance¹. So too it is true that many laws do not even bear the external form of commands; in fact, very few do so. We may turn over page after page of the statute-book and not find an imperative passage. But at the same time it is impossible that law should exist without force, and it is desirable in the analysis of law to bring into prominence this feature of it, for the very reason that it might otherwise be overlooked. It is also desirable that we should be reminded that (as Mr. Harrison says²) it is this force which causes every declaration of the sovereign to be something which is 'not advice, nor an ideal, nor custom, nor an example of any kind,' but an imperative command, as much as any article of the penal code.

Rules of conduct which are not laws, but are enforced by legal tribunals.

17 b. A different, and to my mind a far more serious, criticism of Austin's conception of law and sovereignty lies in the observation that there are many rules of conduct which are treated as binding, and which are enforced just like other laws, but which nevertheless do not proceed from the sovereign authority at all. This is boldly asserted by Bentham, who accordingly divides laws into real commands and fictitious commands³. But, as he then proceeds to argue that all laws which are not real commands, that is, which do not proceed from the sovereign authority, ought to be at once got rid of, his view does not help us. The assertion I have to meet is that there are rules of conduct, and these not rare and exceptional ones, but abounding in every system

¹ See post, sects. 839, 843.

² Fortnightly Review, No. 143, N. S., p. 688.

³ Bowring's ed. vol. i. p. 263, *u.*; vol. iii. p. 223.

and recognised by judges, which do not answer to Austin's description of laws as being commands issued by sovereign authority. This is a different kind of objection to that stated above, namely, that some laws do not fall within Austin's conception, because they are not imperative in form. The objection is the graver one that they do not proceed from the sovereign authority.

It is pointed out, for example, that courts called courts of equity exercise systematically a corrective and supplementary jurisdiction avowedly based not upon positive law but upon morality: that all courts acknowledge the validity of custom; that all English courts administer law which the sovereign never heard of and which they manufacture for themselves; that all courts, whether called courts of equity or not, to some extent try the actions of men, not by a standard fixed by the sovereign, but by their own estimation of prudence, honesty, skill, and diligence. It is urged that whilst, on the one hand, it would be impossible to deny that the courts acting as I have described administer law, on the other, there is no possibility of bringing the law so administered under the conception of a command issued by a sovereign.

18. Austin has, in part, forestalled and answered this objection. With regard to any rule which emanates from a judge he has pointed out¹ that a judge is merely a minister with delegated powers, and any rules made by him, so long as he acts within his delegated authority, are as much commands of the sovereign power as if they had been issued by itself. With regard to customs, which the judge does not make but only applies, he asserts² that until applied they are moral rules only, and that the judge transforms them into legal rules by the same authority as that under which he makes rules which are not suggested by custom. Any judge permitted to make rules he considers to be tacitly empowered to make laws³.

Austin's
explanation of the
action of the
legal
tribunals.

¹ Lect. xxix. p. 547.

² Lect. xxx. p. 560.

³ It has been objected that the validity of a custom cannot be dated

How far
the sove-
reign com-
mands
what he
permits.

19. This answer, so far as it goes, seems to me to be complete. The point at which it has been most strongly attacked is the assertion that the sovereign's acquiescence is equivalent to a command: and if Austin intended to state, broadly and generally, that 'everything which the sovereign permits he tacitly commands,' the assertion is, no doubt, untenable¹. But, as I have already said², Austin does not say this, nor was it possible for him to say this. He does not say 'whatever the sovereign permits to anybody,' but 'whatever the sovereign permits to a judge': nor does he even say 'whatever is permitted to a judge,' but 'whatever is permitted to a judge to order, and is enforced by sovereign authority when it is ordered.' This is what I understand Austin to say is equivalent to a command issued by the sovereign authority itself. Nor does this seem to me to be an extravagant assertion.

Rules of
conduct
applied by
courts of
equity;

20. As regards morality, Austin's opinion seems to be that courts of equity do not, now at any rate, enforce morality as such; that the notion of courts of equity being courts of conscience is obsolete, and that the rules upon which courts of equity proceed are as much rules of law as any which prevail in ordinary courts³. In the ordinary courts he considers the attempt to introduce morality as a basis of decision to be limited to a single decision of Lord Mansfield's, which he thinks deservedly failed⁴.

and by
courts of

21. Austin does not consider the case of courts of common

from its judicial recognition. If by validity is meant influence, this is true; as it is also true that, after legal recognition by an inferior court, it may be still doubtful whether the custom would be recognised by the Court of Appeal. But this only proves that there are rules of conduct which, though recognised by judges, are still not law. This I admit, and I shall discuss almost immediately the consequences of the admission.

¹ Maine's Early History of Institutions, p. 374. See post, sect. 121.

² Supra, sect. 16 a.

³ Lect. xxxvi. p. 640.

⁴ Lect. v. p. 224. The decision here referred to is probably that of *Lee v. Muggeridge*, reported in Taunton's Reports, vol. v. p. 36. It is frequently quoted as a decision of Lord Mansfield, but it was really a decision of Sir James Mansfield.

law enforcing rules of conduct founded upon considerations of honesty, prudence, skill or diligence. It is not unlikely that if he had done so here also he would have said—‘these which you call rules of conduct are really rules of law. It makes no difference that they are rules which men generally think that they ought to observe apart from law. The judges have adopted them and the sovereign enforces them; and upon the principle stated they are, therefore, law.’

22. It is obvious that these answers all depend upon the assumption, first, that the judge has a delegated authority to make rules of law, and secondly, that, in requiring that the actions of men should conform with any rule of conduct which the judge approves, he means to lay down a rule of law. That judges in England can and do make law no one can deny. Take for example the action of judges in regard to what is called ‘undue influence.’ Morality suggests that when one person stands in a confidential relation to another, as his legal or spiritual adviser, he should take no advantage of his position to obtain any pecuniary benefit for himself. Judges have transformed this rule of morality into a rule of law as binding as an act of parliament; and hundreds of similar instances might be given.

Austin's explanation of the action of legal tribunals insufficient.

23. Accepting, however, Austin's explanation as sufficient in such cases as this, I do not think it solves the whole difficulty. There are, I think, cases even in England in which rules are adopted and acted upon by judges, which have not hitherto existed as law, and which judges do not even pretend to make law by acting upon them. In other words, I think judges constantly arrive at a point at which they refer to a standard which is not a legal one. This takes place frequently in modern English law. But if we look further afield, if we turn to the earlier English law, or to modern continental law, we shall find the same, perhaps even a larger, importation into decisions of matter which is not legal. The very notion that a rule can by any possibility be transformed into law by judicial recognition is quite

a modern one even in England, and nothing of the kind has ever been recognised except in England, and in countries which have formed their legal system under the influence of England. This I shall explain more fully hereafter; it is sufficient for the present to indicate the fact which is indisputable. And yet we find that everywhere judges unhesitatingly refer to the principles of jurisprudence as generally recognised, to the principles of equity, and to the guidance of common sense. And they take their guidance as willingly from these sources as from any other.

23 a. After what I have said already¹, it is scarcely necessary to observe that I entirely reject the notion that these cases can be explained by the facile suggestion that the judge acts by the implied permission of the sovereign. That he does so act is true, and it is also true that the sovereign authority can, if necessary, be invoked to enforce the judge's decree. But this does not help us to solve the difficulty. It is not, as we have seen, universally true that judges are permitted to make rules of law, and even where it is otherwise it is no part of the judge's intention in the cases I have put to construct a rule of law: all he aims at is, the issue of a particular command.

Not, however, necessary to modify his conception of law.

24. These admissions seem to place the disciple of Austin in a difficulty. They seem to show that Austin's conception of law is not adequate even as applied to modern English law, and that it is equally inadequate if we look into our own past history, or into the condition of law in other countries. In short, it seems to show that Austin's conception of law fails as a general or scientific conception.

Judges frequently act without law.

25. The difficulty, however, appears to me to be created by an erroneous assumption. It is always assumed when an analysis is made of a judicial decision that it consists of two parts only, a finding of the facts, and an application of the law to the facts so found. There is perhaps a sense in

¹ Supra, sect. 16a.

which this language may be justified¹, but under this language there generally lies an assumption which is certainly erroneous; namely, that when once we have ascertained all the events which have occurred, and which in any way bear upon the matter in dispute, we can never have anything left to do but to apply the law.

26. This conception of a judicial decision, as the mere application of rules of law to events which have occurred, may possibly be an ideal which we ought to endeavour to realise. It was, no doubt, Bentham's ideal, and I should feel disposed to say that he wasted a great part of his life and much of his vast intellectual power in endeavouring to realise it too hastily. But the history of law shows a very different conception of a judicial decision. It is worth while to reflect to how large an extent tribunals have existed, and do exist, without law. We may see this easily enough when a rude and turbulent people is being gradually brought round to peaceful and orderly habits. This I shall show more at length presently. But I will take my first example from one of the modern countries of Europe. Art. 4 of the French Civil Code contains an express provision that the judge who refuses to give a decision upon the ground of the silence or the insufficiency of the law is guilty of an offence, for which the penal code by Art. 185 renders him liable to a fine of two hundred francs. Yet the French judge cannot issue any *repentinum edictum* or fall back, as an English judge often can, upon the inexhaustible 'common law.' Curiously enough, the very next article of the Civil Code, the fifth, expressly prohibits judges from pretending to lay down general rules when giving their decisions². Under such circumstances one might

¹ Speaking of courts in which cases are tried before a jury, it is sometimes said that all questions are questions of law or questions of fact, meaning thereby that all questions are questions for the judge or questions for the jury. Of course in this sense the statement is obviously true. I have discussed this subject in an article in the *Law Magazine*, 4th series, vol. ii. p. 311, to which I beg leave to refer.

² Code Civ. Art. 4: 'Le juge qui refusera de juger sous prétexte du silence,

imagine that a French judge would abandon himself to some such indolent maxim as *prout res incidit*, and give a merely negative decision. Not at all. He refers to what he calls 'la doctrine et la jurisprudence.' He looks at the case from what he calls the 'point de vue juridique.' He relies on the 'principes généraux de droit,' or 'le bon sens et l'équité.' And he does this not because the rules thus vaguely referred to are law, or because he can make them so, but because, like a sensible man, he prefers them to his own unassisted judgment.

Function of judges to regulate as well as to decide disputes.

27. The extent to which judicial tribunals can act, and are obliged to act, without law, becomes still more apparent when we go back to the early history of law. We may easily reach a time when we find a species of rude tribunals in action without any law at all. In a very interesting lecture upon the primitive forms of legal remedies¹, Sir Henry Maine has shown that many ancient forms of procedure may be analysed into disorderly proceedings, which some one steps in to regulate. So too the early history of most Teutonic nations reveals to us a stage at which for the simple struggle between the opposing parties there was substituted a combat under fixed rules. The contrast becomes most striking when we find, as in our own early legal history, the judges of a regular court prescribing the rules and conditions of a combat, and even present at and presiding over it. We read in our Law Reports how the judges of the Court of Common Pleas used to attend in person at the day and place appointed for the combat, attired in their scarlet robes, and accompanied by the sergeants-at-law². The long

de l'obscurité, ou de l'insuffisance de la loi. pourra être poursuivi comme coupable de déni de justice.' Art. 5 : 'Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.'

¹ Early History of Institutions, Lect. ix.

² See a very full report of a combat which was arranged to take place, but which went off because one of the combatants failed to appear, in Dyer's Reports, temp. Elizabeth, p. 301 a.

series of cases to be found in our reports upon wager of battle terminates with one which was decided as late as the year 1819. The incidents of that case from a juristic point of view are not a little remarkable¹. One Thornton was tried for the murder of the sister of Ashford, and was acquitted, whereupon Ashford, being dissatisfied with the verdict, 'appealed' Thornton for the murder. Thornton replied that he was not guilty, and that he was ready to defend himself against the charge by his body; in other words, that he was ready to fight Ashford. To this Ashford replied that Thornton was not entitled to 'wage his battle,' because, under the circumstances (which were stated), his guilt was manifest. At this point the case was submitted to the Court of Queen's Bench, and the judges, after a very long argument, decided that Thornton was entitled to his wager of battle. They doubted, however, whether Ashford had not lost his appeal by contesting, upon invalid grounds, Thornton's right to his wager of battle, instead of accepting his challenge at once: and upon this point, which was reserved, judgment was never given. All through the case was argued upon precedent and authority, precisely in the same way as if the Court had been trying an action of trespass, or upon a bill of exchange. And yet the only substantial question before the Court was, whether the parties should be remitted pretty nearly to the position of a couple of savages belonging to different tribes one of which had suffered an injury which it sought to revenge.

28. Cases like these furnish most interesting examples of the way in which law can accommodate itself to circumstances. In the same way as a judge does not refuse to act, because he cannot find or create a rule of law applicable to the dispute, so he does not refuse to act, because the dispute is not altogether under his control. It is in this way that the law recovered inch by inch the ground which it had lost in turbulent times. After the fall of the Roman

¹ See the report in Barnewall and Alderson's Reports, vol. i. p. 405.

Empire there was a step backwards, and private warfare superseded regular judicial procedure. Still the law was not wholly effaced. It regulated the combat which it would not suppress. So too the vitality as well as the pliability of law is well illustrated when we find a jury defending their verdict by their own bodies, or a magistrate demanding satisfaction for a contempt of court in precisely the same terms as if he were resenting a personal insult.

Judges
and juries
both go
outsidethe
law.

29. It being understood, therefore, that the function of a judge is not only to apply law to ascertained facts, but to decide or to put in train for decision every dispute which comes before him, we are now prepared to consider the position of a judge who, having two litigants before him, finds that one of them has done something which is contrary to the habits, feelings, or opinions of the society to which the parties belong. Is there any rule of law which hinds him to the decision of the case in a particular way? If there is, he must apply it whatever he or others may think of the propriety of it. But if there is not, he must still give a decision: and he will naturally decide against that party whose conduct has been unusual or unreasonable, or dishonest, or negligent. If, as Austin seems to say, there are in all such cases rules of conduct which judges have transformed into rules of law *cadit quaestio*, our assumption that the judge has gone outside the rules of law is unfounded¹. But if it be admitted, as I think it must be admitted, that judges frequently resort to a standard of conduct which, according to Austin's conception of law, is not a legal one, then I say that the mere fact that a judge refers to such a standard does not compel me to conceive law so as to include it. If a judge comes to a decision by drawing lots, or after inspecting entrails, or by causing the parties to submit to some ordeal, or the terrors of an oath, or to a trial

¹ There are a vast number of broad and general presumptions which judges make use of, in order to avoid any very definite conclusion: such for example as *potior est conditio possidentis*, *semper praesumitur pro negante*, &c. These are rules of law, but, unless they are indolent, judges do not often take refuge in these maxims.

of strength and skill, we do not think it necessary to say—it would simply throw all notions of law into confusion to say—that these matters were all thereby brought within the province of jurisprudence. The judge in such cases, as in every case in which he makes any order, delivers, it is true, a command: but this command is not exclusively founded upon law; it may be founded upon chance, or upon the result of a combat, or upon some indication of the divine will and pleasure, or upon the judge's own notion of what is right and expedient.

30. The power which English judges have of making rules of law makes it sometimes difficult to say precisely, when they are importing rules of conduct into law, and when they are going outside the rules of law and making use of the rules of conduct which they find elsewhere for the purposes of their decision. Consequently there are many rules made use of in English courts of justice which hover upon the borders of law, and we are hardly able to say whether they are legal rules or not¹. Of course such a doubtful condition could only exist in English law. But, nevertheless, it so happens that we can see rather more clearly in the English courts than elsewhere the operation of rules of conduct which are not law, because of the separation of the functions of decision between judge and jury. When a case is being tried by a judge with the assistance of a jury, the rule which assigns the respective duties of these two parts of the tribunal directs the judge to decide questions of law himself, and to leave to the jury questions of fact. Generally nothing is said as to how questions of conduct are to be decided; but they are, in practice, always left to the jury,

¹ There was at one time a struggle to establish a rule of law as to whether it was a breach of duty for the servants of a railway company to call out the name of a station before a train had reached the platform: for a time it seemed likely to be recognised that this was a matter of law, but it is now settled that each tribunal must determine in each case what is reasonable. See *Bridges versus North London Railway Co.*, Law Rep. Eng. and Ir. App. vol. vii. p. 213.

unless and until the judge chooses to take any particular question out of the province of the jury by applying to it a rule of law. To say, therefore, that a standard is to be applied by the jury is the same thing as to say that the standard is not a legal one. But the non-legal standard is in fact also applied in courts in which there is no jury, and the nature of the standard does not depend upon the person who applies it¹.

Sovereignty not capable of limitation by law.

31. It is a rigorous deduction from Austin's conception of law that the sovereign authority is supreme, and from a purely legal view absolute. Bentham² has also maintained this, and Blackstone³ has been forced to admit it. No doubt we commonly speak of some governments as free, and of others as despotic; and it would be idle to deny that these terms have important meanings; but they do not mean, as is often assumed, that the powers vested in the one are, in the aggregate, less than the powers vested in the other. As Bentham has pointed out, the distinction between a government which is despotic and one which is free turns upon circumstances of an entirely different kind: 'on the manner in which the whole mass of power, which taken together is supreme, is in a free state distributed among the several ranks of persons that are sharers in it; on the source from whence their titles to it are successively derived; on the frequent and easy changes of condition between governors and governed, whereby the interests of one class are more or less

¹ It may be suggested that since tribunals can act entirely without law (which they certainly can conceivably do), law is not a necessary element in the conception of a political society. It is doubtless possible to conceive a political society with tribunals for settling disputes without law; but, as I consider that it would be the inevitable tendency of such a society to develope law, I do not think that what is said above (§§ 1 sqq.) as to the conception of a political society requires modification.

² Fragment on Government, s. 26; vol. i. p. 288 of Bowring's edition.

³ Blackstone says (Commentaries, vol. i. p. 48) of governments, that, 'however they began, or by what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside.' See also Burgess, Political Science, vol. i. p. 52, and the authorities there cited.

indistinguishably blended with those of the other; on the responsibility of the governors; on the right which the subject has of having the reasons publicly assigned and canvassed of every act of power that is exerted over him.' But, if we once admit that all law proceeds from the sovereign body, to speak of the authority of the sovereign body being limited, or of its acts being illegal, is a confusion of terms.

32. There is only one limitation of sovereign authority which Bentham thinks possible; namely, 'by express convention.' I am not at all disposed to underrate such restrictions, but it seems to me that their value is political rather than legal. They serve as a guide to a conscientious man when he is considering whether he ought to resist authority. Bentham has elsewhere¹ shown the futility of attempting to create irrevocable laws, and there must be, therefore, some body which has the power to revoke, or, in exceptional cases, to set aside even the most fundamental rules; and in that body the supreme authority will reside. Hence it is that very often what was intended as a restriction upon authority really operates as a re-distribution of power. For instance, it was no doubt intended to limit the authority of the President and Congress of the United States, by the fifth article² of the Constitution. But it is Austin's opinion, that the effect of that article is to place the ultimate sovereignty in the States, taken as forming one aggregate body, and to render the ordinary government, consisting of the President and Congress, as well as the States' governments, taken severally, subordinate thereto³.

Limitation by express convention.

¹ Bowring's ed., vol. ii. p. 401.

² This article provides that Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to the Constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress. See also Art. X of Amendments to the Constitution.

³ Lect. vi. p. 268 (third ed.). So too Mr. Mountague Bernard says :

33. There would still be this peculiarity in the United States' Constitution, that the ultimate sovereign power was generally dormant, and was only called into active existence on rare and special occasions. This is not inconsistent with sovereignty, or with our conception of a political society; but it is a peculiarity. And the exact nature of the American Constitution may possibly, in relation to certain questions of international law, become a topic of further discussion.

Functions
of the
Supreme
Court,
how far
political.

34. It is this peculiarity in the American Constitution which gives the Supreme Court of the United States its apparently anomalous character. Of course, whatever may be the effect of the Articles of the Constitution upon the question, whether the sovereign powers of the President and Congress are delegated or supreme, those provisions would fall far short of the object they were intended to secure, if there were not some ready means of declaring when they had been violated, and that all acts in violation of them were void. This function has accordingly been exercised by the Supreme Court; and if Austin is right in considering the President and Congress as *not* supreme, this is only an ordinary function of a Court of Law. The acts of every authority, *short* of the supreme, are everywhere submitted to the test of judicial opinion as to their validity. It may, therefore, be perhaps doubted whether De Tocqueville is correct in calling this function of American judges an 'immense political power¹.' It is, if Austin is correct in his view of the American Constitution, not a political power at all, but precisely the same power as any court is called upon to exercise, when judging of the acts of a subordinate legislature. The High Courts in India, for instance, exercise a similar power, when judging of the acts of the Governor-

'Behind both general and local authorities there is a power, intricate in respect of its machinery, and extremely difficult to set in motion, requiring the concurrence of three-fourths of the States acting by their legislatures or in conventions, which can amend the Constitution itself. This power is unlimited, or very nearly so.'—Neutrality of Great Britain during the American War, p. 43.

¹ Democracy in America, vol. i. chap. vi.

General in Council. And it might be claimed as one of the advantages of Austin's view of the American Constitution, that it makes the position of the Supreme Court capable of a clear definition; and thus renders the dangerous transition from a strict judicial inquiry to considerations of a political character, when the validity of acts of the Government is called in question, though still far from improbable, at least less easy.

35. Moreover, even if the power of the Supreme Court can be correctly described as a political power at all, I doubt whether it has not been exaggerated. Should the Supreme Court and the President and Congress ever really measure their strength, it must be remembered that by the Constitution¹ the President nominates, and with the advice and consent of the Senate appoints, the Judges of the Supreme Court, to hold their office during good behaviour². This would probably be taken to mean, that they could be removed after conviction, upon impeachment for misconduct. They are thus appointed by, and are responsible to, the very persons to whom they would by the hypothesis be opposed; and who by the hypothesis are tyrannical³. Now it is not at all impossible that, so long as the Supreme Court preserves its high character for integrity and independence, it may serve many very useful purposes; but it seems to me to go too far to say, as De Tocqueville says, that 'the power vested in the American courts of justice of pronouncing a statute to be unconstitutional, forms one of the most powerful barriers which has been ever devised against the tyranny of political assemblies.' I think Bentham, in the passage I have quoted, has much more correctly stated the true securities against tyranny, whether of individuals

¹ Art. II. sect 2. cl. 2.

² Art. III. sect. 1.

³ I assume this, and also that the President, the Senate, and the House of Representatives are acting unanimously in their opposition to the Supreme Court. As a check on each other these separate bodies can act to any extent. But it is upon their tyrannical action when united that an external check of some kind is required, and this I think the Supreme Court would fail to supply.

or of political assemblies, so far as it is possible for this protection to be constitutionally secured. These securities Americans enjoy to the fullest extent, coupled with certain national sentiments of perhaps even greater importance.

Practical
limita-
tions on
the abso-
lute na-
ture of
sovereignty.

36. It is also necessary to observe that what I have said as to the absolute nature of the sovereign authority, which is the purely legal view of the relation between subjects and their rulers, does not in any way represent this relation in many of its most important aspects. Though for legal purposes all sovereign authority is supreme, as a matter of fact the most absolute government is not so powerful as to be unrestrained. Though not restrained by law, the supreme rulers of every country avow their intention to govern, not for their own benefit, or for the benefit of any particular class, but for the members of the society generally; and they cannot altogether neglect the duty which they have assumed. In our own country we possess nearly all the institutions which have been above referred to as the characteristics of a free government. A regular machinery exists for introducing into the ruling body persons taken from all classes of the community, and for changing them, if the measures of those in power become distasteful. Liberty of the press is everywhere conceded. The humblest subjects, though they may have no defined power, have a right to meet and to state their grievances, provided they do not disturb the public peace. And the Government hardly ever refuses to listen to such remonstrances, though, through ignorance and selfishness, they not unfrequently turn out to be unfounded, or to represent but very feebly, if at all, the real interests of the community at large.

Persons
exercising
sovereign
power are
generally
subject to
law.

37. We must also distinguish the independence of the sovereign body itself from the independence of the members who happen to compose that body. The Queen, the members of the British Parliament, the Viceroy of India and of Ireland, the President of the United States of America, are all

subject to the same general laws as ourselves : only for reasons of convenience the process against them in case of disobedience is somewhat different.

38. I have dwelt upon these practical qualifications of the doctrine of the supremacy of the sovereign authority, because that doctrine has been thought to arm the actual rulers of a country with unlimited powers ; to destroy the distinction between free and despotic governments ; and to absolve the holders of power from all responsibility. It does nothing of the kind. Even where no attempt has been made, as in America, to bind the exercise of authority by a special set of rules, or to submit it, as in France under the Republic and the Second Empire, to the popular will¹, powerful checks exist upon the exercise of arbitrary authority, which are none the less effectual because they do not belong to the province of law.

39. Having then established that the sovereign body, as such, is independent of law, and that the sovereign body lays down, as positive law, the rules which are to regulate the conduct of the political society which it governs, the inquiry into the relation of rulers and their subjects would, for legal purposes, seem to be complete. It would be a simple relation of governors and governed.

40. But, in fact, this simple state of things is nowhere known to exist. Not only does the sovereign body find it necessary to employ others to execute its commands, by enforcing obedience whenever particular individuals evince a disinclination to obey the law ; but in almost every country authority is delegated by the sovereign body to some person or body of persons subordinate to itself, who are thereby empowered, not merely to carry out the sovereign commands

¹ The Constitution of the Fourteenth of January 1851, does not, like that of the Fourth of November 1848, contain a declaration 'that the sovereignty resides in the whole mass of French citizens taken together' (Art. I), but it attempts to give effect to a similar notion by declaring the right of the Emperor (then called President) to appeal to the people at large (Art. V).

in particular cases, but to exercise the sovereign power itself, in a far more general manner; sometimes extending even to the making of rules, which are law in the strictest sense of the term.

41. When the sovereign body thus substitutes for its own will the will of another person, or body of persons, it is said to delegate its sovereignty¹.

Gradation
of powers
delegated
by sove-
reign.

42. There is scarcely any authority, even to execute a specific command, which is conferred by the sovereign body in terms so precise as not to leave something to the discretion of the person on whom it is conferred. On the other hand, there is scarcely any delegation of sovereignty which is so general and extensive as to leave the exercise of it, at any time, completely uncontrolled. And it would be easy to construct out of the powers usually delegated to others by the sovereign body, a continuous series, advancing by insensible degrees, from the most precise order, where the discretion is scarcely perceptible, up to a viceregal authority, which is very nearly absolute. Any attempt, therefore, to divide these powers accurately into groups by a division founded on the extent of the authority conferred must necessarily fail.

43. It is, however, common to mark off and classify some of the more extensive and general of the delegated powers by describing them as 'sovereign' or 'legislative'; or (in order to distinguish these delegated powers from the powers of the supreme sovereign body itself) as 'subordinate sovereign' and 'subordinate legislative'; whilst the powers which are specific are described as 'judicial' or 'executive.' The term 'administrative,' so far as it has any definite meaning at all, seems to be used to describe powers which lie somewhere between the powers which are more general and those which are more specific. No harm results from the use of these terms, which are sometimes convenient, if it be borne in mind that they do not mark any

¹ Austin, *Lecture vi.* vol. i. p. 250 (third edition).

precise distinction. They are just as useful as the terms 'great' and 'small,' 'long' and 'short,' but are not more precise.

44. To confer the power of making laws is the most conspicuous mode of delegating sovereign authority, and it has been sometimes spoken of as if it were the only mode. But it is not so. The Viceroy of India, when he declares war, or makes a treaty, exercises the sovereign authority as directly and completely as when, in conjunction with his Council, he passes an Act. So the Governor of Jamaica or the Lieutenant-Governor of Bengal, when he grants a pardon, exercises a peculiar prerogative of sovereignty. So every Judge, from a Justice of the Peace up to the Lord Chancellor, exercises a power which in its origin, and still theoretically, belongs exclusively to the sovereign, and which was at one time considered the most conspicuous attribute of sovereign authority.

Different modes of delegating sovereignty.

45. I have deferred until this point any consideration of the origin and foundation of political society; as to how it was that one man came to make laws for another; and why this, which was the practice in earlier associations, is still the characteristic of every political society: and I do not now intend to enter upon this inquiry fully, but only in order to get rid of some misconceptions which seem to me to be subversive of all law.

The actual origin of the authority to make laws.

46. The inquiry into the origin of political society is obviously an historical one, and does not admit of speculation. But obvious as this is, it is very rare to find the subject historically treated. People are very apt to declare the origin of political society to be that which best accords with their own political theories. Thus it is the theory of some that kings rule by divine right, and so they assert it to be a fact that political societies under a monarch are a divine institution. Other people say that it is natural to be so governed, and then they allege that nature, as a sort of

deity, or occult agency, led people to institute a society upon that basis. Other people think that no one could be obliged to obey any ruler without his own assent, and then they say there was a compact that all should obey their ruler or rulers. This last notion, false as it is, is a great advance upon the other two, for it accounts better for all the different forms of government, and it appreciates, partially at any rate, the important fact that in all governments there are mutual interests to be considered, and that there is always some sort of concession and compromise. The theory of the social compact is, in fact, a protest against the desolating theory of divine right, but it falls to the ground before the obvious and simple remark, that it never had and never could have any real existence.

47. The actual origin of most governments is shrouded in obscurity, but one thing seems to be clear, that it never occurred to any one to invent government. New forms of government have been invented, and one form of government has been substituted for another. But government itself did not come into existence all at once as a brilliant idea, or as a device to escape from a difficulty. It grew up very gradually, and probably without even those who were engaged in establishing it knowing exactly what they were about.

Present
basis of
authority
to make
laws is
utility.

48. It is very possible that most, if not all, existing governments had their origin in the passions of a single individual, or a few individuals banded together to oppress their neighbours. But whether this be so or not makes no difference whatever when we are considering why governments exist now. They exist now because the happiness of the people is thereby promoted, or at least because their unhappiness is less likely to be increased by leaving the government where it is than by disturbing it. No one, I think, now seriously denies this. These are the grounds upon which we lend our support to a government, even when it is obviously bad. We know that the worst government

is better than none at all, and that the chances of improving an established government are generally far better than the chances of setting up a new and improved government in the place of one which we have destroyed.

49. The happiness of the people, therefore, is the only true end of government. No ruler does avow, no ruler dare avow, any other. Various pretexts have been put forward in times past for the claim of one man to rule over another, and they have not unfrequently been answered by pretensions equally unfounded. All these Bentham has thoroughly exposed—divine right, the law of nature, the social compact, the principles of liberty, and the imprescriptible rights of man: and of these, in the form at least in which they were then in vogue, we hear but little now. But admitting this, there is still a desire to substitute some *a priori* conception between us and the principle of utility. We are told that although the happiness of the people is the ultimate end of government, it is useless to attempt to arrive at happiness by placing that object directly before us. We are directed to try and discover the laws of life and the conditions of human existence, which, it is said, will alone lead us to happiness. Doubtless if we could discover these laws and conditions, and could feel sure that by obeying them we should arrive at happiness, this is advice which ought to be followed. No utilitarian would object to this, for utilitarians (as Mill observes¹) always desire the tendency of actions to be judged not, as their enemies assert, by the conflicting views of individuals, but by the widest inductions possible.

The only guide to the legislator is utility.

50. When, however, we are asked to accept a principle as a guide of action because it is one of the primary laws of life, we are justified in examining it with some caution; and this caution is especially necessary just now, for I fear that there is great danger of the respect for law being undermined by a principle which we are asked to accept

¹ Essay on Utilitarianism, p. 24.

on the ground that it is one of these primary conditions, and which, though invented by philosophers, is adroitly made use of by the declared enemies of society.

The principle of equal freedom.

51. The principle which has been put forward by a great authority as a safer and more direct guide to happiness than the principle of utility is that which is called the principle of equal freedom. Stated more at length the principle is that 'every man has freedom to do all that he wills provided that he infringes not the equal freedom of any other man¹.' The form in which the principle is stated is peculiar, but I take it to mean that 'every man *ought to have* freedom to do all that he wills' with the proviso stated. I should, however, have still some doubt as to the meaning of the principle had not its most celebrated exponent himself explained it. It means that all coercion of one human being by another is immoral: that immorality is inherent in government and attaches to all its functions².

52. It is worth while to observe that up to a certain point all utilitarians would agree with this. They agree that all coercion is an evil; and therefore that all subjection is an evil. But they say that this is a fact out of which you can make nothing for the purposes of society. Bentham, no doubt, says a good deal more than this, with which I am not now concerned. It may be that Bentham's ethical theory is altogether unsound. It may be that moral philosophers may understand the assertion that 'all coercion is immoral' in some abstract sense in which it is true. But it is impossible to apply any such principle in the world in which we live to the affairs of life. Further, to attempt to apply it will open the door wide to anarchy and confusion, for if we once admit that law is immoral, all hope of defending it is gone.

53. In a former edition of this work I discussed at some length Mr. Herbert Spencer's assumption of the law of equal

¹ Herbert Spencer, *Social Statics*, ed. 1892, p. 54.

² *Social Statics*, p. 116.

freedom from which he deduces the disastrous consequence that all law is immoral. I did so because he applied the principle with great severity to some of the existing institutions of society, especially to the ownership of land. But that eminent philosopher has somewhat changed his views, as appears by his more recently published works: and though he still maintains as the primary law of society a principle which renders the private ownership of land inequitable, he makes the important concession that, inasmuch as the practical application of his principle would (in his opinion) 'work ill,' and 'the resulting state of things would be a less desirable one than the present,' the principle need not be acted on¹. In other words Mr. Herbert Spencer (as I understand him) does himself agree that the question whether the private ownership of land shall be retained as an existing institution does ultimately depend upon considerations, not of freedom, but utility. I have always maintained that the principle of equal freedom is really useless as a guide, because it is subject to an indefinite number of exceptions of which we can only determine the existence by the method of observation and experience as applied to their results: in other words by determining their utility. Though therefore I may deplore that any philosopher should think it necessary to commit himself to such a dangerous statement as that law is immoral, I think the very fact that he finds such a doctrine unworkable is a strong testimony against it.

54. Moreover it is the less necessary for me now to say anything at length on this subject, seeing that the utilitarian position has been defended by a far abler hand than mine. Professor Sidgwick in his 'Principles of Politics' maintains, as I do, that the ultimate standard by which the action of government must be measured is its conduciveness to the general happiness of the governed².

55. The principle of equal freedom, as set forth by The principle of

¹ Principles of Ethics, vol. ii. p. 444 (ed. 1893).

² Pp. 34, 36.

the realisation of the will.

Mr. Herbert Spencer, does not differ very materially from that which has been enunciated by a German writer of a very different school. Lassalle, in his 'Theory of Acquired Rights,' lays it down that private law is 'the realisation of the will of the individual¹.' This captivating paradox is not apparently used by Lassalle for any very destructive purpose in the work I have referred to, but the preface discloses that the author well understood the use that might be made of it: and the worst of all such dogmas seems to me to be that you may draw from them any consequences you please.

Utility the only practical test of public conduct.

56. Nothing to my mind is more refreshing than to turn from these vague and dangerous speculations to the solid ground of utility. Though there may be use in such speculations in their proper place I object to their being thrust across the difficult path of legislation, not to show us the way, but only to mislead us, and reduce us to a condition of helplessness. Why are we to be led at every turn to the brink of a precipice, and then have to trust to the goodnature of those about us not to throw us over? People say that the principle of utility is barren. It certainly will not enable us to do just what we please. But at any rate when I have found out which of the several courses of action open to me is most likely to be useful—that is, when I have formed a judgment as to which course of action is likely to produce

¹ Vol. i. p. 57. In this passage he speaks of private right only, but I gather from the preceding page that he would apply the same principle to all law. Referring, I suppose, to Savigny's definition of a jural relation (*Rechtsverhältniss*) as 'a province of the independent mastery of the individual will' (*System d. h. Röm. Rechts*, § 52) Lassalle says (*Pref. p. viii*): 'So it is well known that in Germany, Savigny, as the head of the historical school, is considered to be the most prominent representative of the reactionary party, whereas his notions upon the subject of acquired rights are in reality revolutionary and subversive, as compared with the follies and inconsistencies in the position taken up in regard to this subject by those who are supposed to represent liberalism in philosophy.' I do not pretend to understand exactly what Savigny's theory of acquired rights was, but there seems to be something dangerous in his talk about them. See further as to Lassalle's views the passage quoted *infra*, note to sect. 56.

the greatest amount of happiness and the least amount of misery to all whose interests are affected—I know what to do. This no dogma about freedom will ever tell me. I hear it loudly proclaimed that all government is evil. I answer ‘undoubtedly it is so, but anarchy is a greater evil still.’ I am told that the institution of property is a cruel injustice. I reply that this depends upon whether it tends to promote subsistence, abundance, and security. It may probably be answered that it promotes all these to some extent, but that it to some extent defeats them. But does it on the whole promote them, more than its abolition would do? This requires to be looked into, and every one of the rights of property requires to be examined by this test. If the changes proposed be examined by the same test, no harm can arise. Some men may come out of the process richer and others poorer, but mankind at large will be at least as happy, and probably happier. At any rate we may be sure that, whether we like it or no, all the rights of property will presently be tried by some test or other. They are being so tried now. In this I agree with Lassalle, who asserts, truly enough, that this is the great social question of the age. This (as he says) is the question which lies at the bottom of all other questions, and which the moment it is touched makes the chest heave and the pulse beat¹. This excitement will certainly lead to bloodshed if we go about telling people that all law is immoral, and that to do right we have only to see that we realise the will of the individual. On the other hand, we may just escape bloodshed if we can induce people to reckon up what will be the probable gain or loss of any proposed change: especially if we can get them also to remember that every violent change involves a great risk of security,

¹ Preface, p. vii. ‘Was ist es, das den innersten Grund unserer politischen und socialen Kämpfe bildet? Der Begriff des erworbenen Rechts ist wieder einmal streitig geworden. Und dieser Streit ist es, der das Herz der heutigen Welt durchzittert und die tief invendigste Grundlage der politisch-socialen Kämpfe des Jahrhunderts bildet.’ And this is becoming truer every day.

and that without security nothing in the world is worth having.

Legislation a feeble instrument of happiness.

57. If instead of saying that we ought not to take utility as our guide in legislation, it were said that legislation, even with utility for its guide, is, after all, but a feeble instrument of happiness, I should be much more inclined to agree. I take it, however, that this is not because we have chosen the wrong principle to guide us in legislation, but because legislation can never under any circumstances be a potent instrument for happiness. Nearly all that the lawgiver can do is to remove impediments to people procuring happiness for themselves; and to secure them from being disturbed in the enjoyment of it. Even as regards procuring for persons the necessities of life, the best the law can do is to secure them the fruits of their labour. If this is insufficient, the law can only supply the deficiency by doing (as it were) violence to itself—that is, by seizing the property of one man to satisfy the wants of another. Security is the main, it may almost be said the sole object of the law. But here again the action of the law is almost wholly negative. The law can only foster security by punishing or redressing invasions of it. Moreover not only is the action of the law thus limited, but the very process itself of protecting security necessarily involves a sacrifice of security. In whatever way security is protected, whether by courts of justice, or by an armed force, or by a police, the process is an expensive one, rendering it necessary to impose taxes; and every tax is more or less a sacrifice of security; a small one no doubt, but still a sacrifice, and therefore a remedy which, if applied on too large a scale, would fail in its effect¹.

58. The same truth may be put in another form by saying

¹ These somewhat trite, but still useful, observations on the objects of law are set forth in the 'Traité de Législation' published by Dumont from the original MSS. of Bentham. They may be read (and they deserve reading) either in Hildreth's translation of Dumont's work, or in Bentham's collected works, vol. i. pp. 301-322.

that the value of law is to be measured not by the happiness which it procures, but by the misery from which it preserves us. And it is also unfortunately true that besides the misery which governments are compelled to inflict in the way of punishment and coercion in order to prevent mischief, they inflict untold misery for their own selfish purposes. Yet we must remember that, as Bentham says, the worst government ever known is infinitely better than no government at all. Without government one half of the world would be robbing and murdering the other half. This, and not the loyalty or affection which we owe to our rulers, is the really strong argument against revolution. Over and over again governments—I fear it must be said all governments—are guilty of iniquities which would fully justify their expulsion from power; but the question must always still be asked—Can the existing government be replaced by a better? Can it be replaced at all? The righteousness of a cause is never alone a sufficient justification of rebellion.

59. We shall, therefore, look for happiness in the wrong direction, if we expect it to be conferred upon us by the law. Moreover, not only is it impossible for the law to increase the stock of happiness: it is just as impossible for the law to ensure an equal distribution of it. Equality may be hindered by the law, it cannot be promoted by it. Any attempt to promote it by taking from one man and giving to another could only end in destroying wholesale the sources of happiness. But though it is impossible that men should ever be made equal in the sense of each obtaining an equal share of happiness, it is still a cardinal assumption of utilitarians that all men are equal in the sense that in estimating happiness one counts for one and no more: that is, as I understand it, that no person whatever has a right to say that he has a better claim to consideration than another. If the law could, it would make the happiness of all men exactly equal. If this is not attempted, if when one man has appropriated to himself a larger share of the

Law can
neither
increase
happiness
nor dis-
tribute it
equally.

sources of happiness than his neighbours, the law protects him, it is because this protection is for the benefit of all: or, which comes to the same thing, because to withdraw it would injure all. For no other reason and to no greater extent ought we to maintain the unequal condition of individuals.

CHAPTER II.

SOURCES OF LAW.

60. There are several inquiries which have been prosecuted under this head, and some writers have thrown themselves and their readers into inextricable confusion, by pursuing more than one of these at the same time, without noticing the distinction between them.

What is meant by sources of law.

I am not now about to inquire whence it is that rules of conduct acquire the binding force of law—that I have already made to depend on the will of the sovereign authority.

Nor am I about to inquire how or why the sovereign authority came to have the power to make laws; that, as far as I think necessary, is also discussed in the previous chapter.

What I mean now to inquire into is simply this:—where, if a man wants to get at the law, he must go to look for it¹.

61. The primary and most direct source, and, where it is to be found, the exclusive source of law, is the expressly declared will of the sovereign authority. When the sovereign authority declares its will in the form of a law, it is said to legislate; and this function of sovereignty is called legislation: the body which deliberates on the form and substance

The primary source is declared will of the supreme

¹ Even with these limitations there is still room for much indefiniteness in the term 'sources of law.' We generally mean by it, as will appear from the text (sect. 99), something more than mere *literature*; I do not pretend, however, that it would be possible to draw an exact distinction between *literatura* and *auctoritas*. Lawyers frequently fortify their conclusions by references to opinions which are not, in a forensic sense, *authoritative*.

of such laws before they are promulgated is called the legislature; and the laws so made are called acts of the legislature.

or sub-
ordinate
legisla-
ture.

62. It has already been remarked that legislation, like any other function of sovereignty, may be delegated to a subordinate person or body of persons. In this case the subordinate legislature is the mouthpiece of the sovereign authority, and the declarations of the subordinate legislature derive their binding force from the will of the sovereign authority, just as much as if they had been framed and issued by the sovereign authority itself.

Subordi-
nate legis-
lation in
India and
the Colon-
ies.

63. All the colonies of England present examples of this delegation of legislative power, but nowhere have subordinate legislative authorities been multiplied to so great an extent as in India. Thus in the province of Lower Bengal alone there are four distinct bodies or persons, each possessing a very extensive legislative authority. There is first the British Queen and Parliament, the supreme authority; then the General Legislative Council; next the Governor-General himself; and lastly the Council of the Lieutenant-Governor of Bengal. This example of subordinate legislation illustrates not only the extent and importance of the function, but also the evils which may attend it. Where the power of legislation is conferred on such a variety of persons it is certain that there will be confusion of laws, and there is also great danger of the worst of all evils, namely, of doubts being raised as to whether the legislative authority of some of the subordinate bodies has not been exceeded. For the supreme sovereign authority is always obliged to allow the authority of its subordinates to be questioned, in some form or other, by the courts of law, in order to keep a check on their usurpation of power; though sometimes it resorts to that highly unsatisfactory expedient for getting out of the difficulty—an *ex post facto* ratification of acts which are admittedly illegal.

Methods
of delega-
tion.

64. It may also be desirable here to notice that sovereignty is delegated upon two distinct principles in the dependencies

of England. In India the Governor-General and Legislative Council constitute together a legislature whose functions are expressly limited in several directions, and whose action is expressly made subject to the control of the British Parliament, which, it is obviously contemplated, will in no wise discontinue the habit of occasionally making laws for India. On the other hand, most of the colonies possess constitutions which confer upon their respective legislative assemblies, together with the Queen of England (usually represented by a Governor), legislative authority of the most general kind, and which obviously contemplate that all the ordinary functions of legislation will be carried on within the colony itself. But colonies possessing such constitutions are still subject to the same sovereign body as ourselves, the Queen and the two Houses of Parliament. The power of the British Parliament over a colony, though dormant, is not extinguished by the grant of such a constitution as I have described. There is amply sufficient in the Acts of Parliament which grant colonial constitutions to make the very acceptance of them a mark of subordination¹.

65. Legislative functions are also exercised, not only by bodies expressly constituted for that purpose, and under the name of legislation, but by bodies of persons who have the power to frame rules for the protection or convenience of the inhabitants of certain localities. Thus in large and populous towns we frequently find a body called by the name of a municipality, which has power to make bye-laws, as they are called, for regulating the conduct of the inhabitants, and even to impose taxes. So the Privy Council, and Boards of Health, and of Education, frame rules for special objects

Indirect
delegations
of
legislative
authority.

¹ See the 15 and 16 Vict. chap. lxxii. (New Zealand), and the 30 and 31 Vict. chap. iii. (British North America). In all these acts the supreme sovereignty of England is, in accordance with traditional usage, studiously referred to as if it were vested in the Queen alone. But of course no one can doubt that the Queen and the Colonial Parliament are subordinate to the Queen and the English Parliament. See Parliamentary Government in the British Colonies, by Alpheus Todd, pp. 34, 168, 188, 192.

intrusted to them, which are some of them laws in the proper sense of the term. So too Courts of Law issue general rules of procedure in matters of litigation which are also law. In these cases the power of legislation has been expressly conferred.

Subordinate legislatures cannot delegate.

66. The sovereign body can always delegate its function of legislation to any extent it pleases; it being wholly uncontrolled not only in the matter, but in the manner of legislation. In other words, the sovereign body not only exercises the legislative function, but is the author of it also.

But a subordinate legislature, not being the author of its own functions, and having no control over the manner of legislation, can only delegate its functions so far as it has been authorised to do so. General legislative powers, such, for example, as are possessed by the Legislative Council in India, would undoubtedly carry with them some powers of delegation, which should, however, be very carefully exercised lest the bounds of authority be exceeded.

67. I have mentioned legislation as the primary source of law because it is the most direct, the simplest, and, so to say, the supreme source of law. But active legislation is a characteristic of advanced societies only. In the earlier stages of civilisation there is little legislation: in the earliest, none¹.

Sources of law other than legislation are explained by the history of law.

68. The sources of law other than legislation are complex and difficult to understand; and without a glance at the general history of the development of law I do not think I could make what I have to say as to the sources of law intelligible. Without attempting, therefore, anything approaching to a complete historical discussion, I propose to give a short sketch of the general development of law, adverting afterwards to certain peculiarities of its development in some countries of Europe and of Asia. I hope in this way to be

¹ In India there is a whole field of law which has never been touched by legislation: and in all Mahommedan countries the action of the legislature is greatly restricted.

able to throw a little light upon some obscure questions in the history of the sources of English law.

69. Early in the history of most ancient systems of law we find something in the nature of a code, using that term with some latitude to express any collection of written laws more or less complete and formal. Such a code was the Mosaic law, the law of the Twelve Tables, the so-called laws of Manu, the laws of Solon, and the Koran.

Early
appear-
ance of
codes.

70. A code once made is the basis of all future progress. The future history of law is the history of the modes by which the provisions of the code are extended and modified in order to meet the growing wants of the community. There is no more interesting study in the history of law than that of the modes by which this modification and extension have been effected.

How early
law deve-
loped.

71. A code is always an effort of legislation, yet the early preparation of a code is not by any means a sign that the nation is capable of a continued effort of legislative activity. In Rome, in the centuries which immediately followed the introduction of the code of the Twelve Tables, there was very little legislation; in Eastern nations continued legislative activity has never been developed at all; in Western nations it has never been able to satisfy the requirements of a progressive people. Other means of modifying and extending the law have had to be devised, and one of the most potent instruments which have been used for this purpose is that which is called interpretation.

Not gener-
ally by
legisla-
tion.

72. ¹ Strictly speaking, interpretation is a process which would produce neither extension nor modification of the law. Given the rule of law, the only question which, strictly speaking, interpretation has to solve is—what conduct does the rule prescribe? There are three elements into which this inquiry may be analysed—the grammatical, the logical, and the historical element. First, we may consider the words

Interpre-
tation as
explained
by Savig-
ny.

¹ See and compare what is said on the subject of interpretation in Savigny, *System d. h. Röm. Rechts*, Bk. i. ch. 4, ss. 32 sqq., from which many of my observations are taken.

used, and take them according to their ordinary meaning and construction: this is the grammatical element in the process. Then we may consider each portion of the rule with its context, and observe the relation in which the several portions of the rule stand to each other: this is the logical element. Lastly, we may consider the condition of the law when the rule was introduced, and what defect or error it was proposed to remedy: this is the historical element.

73. Closely connected with the historical element, and scarcely, I think, distinguishable from it, is the *ratio legis* as an instrument of interpretation. But caution must be exercised in referring to the *ratio legis* as an instrument of interpretation, as it may easily be mistaken: especially we must be careful not to confound the true *ratio legis* with the mere accident which may have led to its introduction¹.

74. The grammatical interpretation of a rule of law may leave no doubt as to the meaning of it. But, on the other hand, a rule of law may on a grammatical consideration of it present several meanings; and neither the logical nor the historical consideration of it may indicate with certainty which of these meanings is the correct one. Or it may happen that the grammatical consideration of a rule of law suggests one meaning, whilst the logical, or the historical consideration of it suggests another. In a case of conflict the grammatical meaning generally prevails, but not always. The plain grammatical and logical meaning of the act of Elizabeth relating to leases by ecclesiastical corporations has always been restricted by the *ratio legis*.

75. When the grammatical consideration supplies several meanings, and neither the logical nor the historical consideration determines with certainty which is the true meaning,

Interpre-
tation
used to
extend
the law

¹ Savigny gives the example of the *Senatusconsultum Macedonianum* which was passed in consequence of the murder of his father by one Macedo, who was pressed for money to satisfy his creditors (*Glück, Pandekten*, vol. xiv. p. 306). So the maiming act (22 and 23 Charles II, chap. 1) was passed (as appears from the act itself) on the occasion of the cutting off Sir John Coventry's nose.

then we resort to other considerations. If the rule of law is looked on with favour we interpret it liberally, that is, so as to bring under it as many cases as possible: if it is looked on with disfavour, we interpret it strictly, that is, so that it may embrace as few cases as possible.

where the meaning is doubtful.

76. So far we have been considering interpretation proper. But suppose the judge to have before him one of those cases to which I have already alluded, for which there is no rule of law precisely suitable. Still the judge must decide the case, and being desirous, as judges generally are desirous, not to rest the case upon his own arbitrium, he will naturally try to get more out of the existing rules of law than can be obtained by the regular process of interpretation. He will try and discover from what actually is said what probably would have been said had a larger class of cases, including the one before him, been within the contemplation of the framers of the rule. This attempt on the part of the judge is not due to any assumption of authority, but rather to a respect for the authority of others. It is a logical process and it is applicable chiefly to those new relations which have arisen since the rule was made, and which it is impossible, therefore, to say are within its provisions. The process is sometimes expressed, and in a manner justified, by saying that the case to which the rule is extended is within its equity. This equitable extension of a rule involves, of course, the process of interpretation, and the judge assumes it as certain that he is acting in conformity with the declared will of the legislator in his application of the rule. Still, put it how you will, it is more than mere interpretation. It is, to some extent, an application of the principle of analogy.

77. It is by this use of his judicial discretion, in cases where a doubt leaves him a discretion, that a judge manages to make a rule of law cover more ground than was intended; and sometimes, but more rarely, by a reverse process, he narrows its application. There are indeed cases of bolder extension still which one hesitates to class under extension by interpretation,

Extension by analogy.

and which perhaps ought to be classed apart as cases of extension by analogy. Even though the judge in such cases can scarcely pretend that he is still carrying out the declared will of the legislator, yet, having no other rule to go by, he thinks it safe to extend a rule which he has learned from experience to be a salutary one. Or perhaps he will put it in this way. He will say that the rule may be taken to be a single example of the application of a wider principle which it involves, and so he will justify the application of the principle to cases not specially provided for.

Dislike of
legislators
to judge-
made law,

78. Thus it is that so-called interpretation becomes a source of new law. The authors of modern codes generally look upon it with disfavour, as did the Emperor Justinian. They wish to stop all extension of the law except by direct legislation, and to bind down the judges by inflexible rules, proposing to make provision by future legislation for all unforeseen cases as they arise. But an active legislature is not even now popular: nor do legislative assemblies deal by any means successfully with matters of detail. Judicial legislation, on the other hand, is generally popular, and I have very great doubt whether the extension of the law by judicial interpretation is so great an evil as has been alleged¹.

which is,
however,
generally
popular,
and suc-
cessful.

¹ Justinian forbade all attempts to extend the law by way of interpretation, including in the prohibition commentaries as well as judicial decisions. 'Nemo . . . audeat commentarios isdem legibus adnectere, nisi tantum si velit eas in Graecam vocem transformare sub eodem ordine eaque consequentia sub qua voces Romanae positae sunt: . . . alias autem legum interpretationes, immo magis perversiones eos jactare non concedimus. . . . Si quid vero ut supra dictum est ambiguum fuerit visum hoc ad imperiale culmen per iudices referatur et ex auctoritate Augusta manifestetur, cui soli concessum est leges et condere et interpretari.' Co. Just. i. 17. 2. 21. The French legislature has taken a middle course. Art. 5 of the Code Civil (quoted above, s. 26, n.) prevents the ordinary judicial interpretation from becoming authoritative. But by a law of 27 Ventôse, An. viii, art. 88, 'Si le commissaire du gouvernement apprend qu'il ait été rendu en dernier ressort un jugement contraire aux lois ou aux formes de procéder, ou dans lequel un juge ait excédé ses pouvoirs, et contre lequel cependant aucune des parties n'ait réclamé dans le délai fixé, après ce délai expiré, il en donnera connaissance au tribunal de cassation; et si les formes ou les lois ont été violées, le jugement sera

79. Of the several processes by which law is extended the next which I shall consider is custom. Some writers say that a custom exists as law wholly independently of the will of the sovereign authority, and they derive its obligatory force from the consensus utentium, or, in modern phrase, from the national will, or national conviction. But the growth of custom into law seems to me rather to be a survival of the period when disputes were generally settled by tribunals without law. The growth of custom into law is analogous to the growth of law itself, in an infant society. At first there is no conception of law proceeding from a distinct author, but only of commands. If a dispute is decided by authority, the decision is supposed to come from some divine inspiration. Such commands were issued at first by the king and then by an aristocracy, which was in the West political, and in the East religious. Where we find the heads of a village, or the lord of the soil, exercising a sort of rude jurisdiction, these tribunals would naturally tend to base their decisions upon custom, that is, upon the habits of those with whom the judges were best acquainted within their own jurisdiction.

It is however scarcely too much to say that every such authority, if allowed to continue, in time transforms itself, or is transformed, into a court, and treating its traditional customs as binding rules, brings into existence a body of law. The law so generated is called custom. I do not, of course, mean by this that all custom necessarily originates within a tribunal. But the members of the tribunals would know the customs better than their fellows; they would give effect to them, and would ensure their permanence, first, by a precise oral

Custom
antece-
dent to
law

becomes
law by
being re-
corded and
observed.

cassé, sans que les parties puissent se prévaloir de la cassation pour éluder les dispositions de ce jugement, lequel vaudra transaction pour elles.' This interpretation would, I understand, be authoritative notwithstanding the provisions of Art. 5 of the Code Civil. So also (I understand) would be a decision of the Court of Cassation given a second time on a second appeal between the same parties. See Dalloz, Répertoire, s. v. Lois, ss. 458 sqq. In England all judicial interpretation by the superior courts is authoritative, because all their decisions are authoritative.

tradition, and afterwards by a written record ¹. Customs are suggested by the habits of the people, but they are preserved, strengthened, and given effect to by the practice of the courts.

80. Nothing more is necessary for the growth of a custom than that people should have some tradition of what their fathers did before them, that they should repeat the same conduct on similar occasions, and that they should be convinced that what is so done is right. And no external force is needed for the growth of custom. The tendency of men to allow their conduct to be ruled by custom is always strong: and those whose duty it is to arbitrate in disputes, are always especially ready to fall back upon custom, whereby they reduce their own responsibility and are almost sure to gain the applause of their neighbours.

Various
operation
of custom
and inter-
pretation.

81. The operation of custom and of interpretation in modifying the law depends upon a variety of circumstances. The reduction of rules of law into writing has a tendency to check the growth of custom: but interpretation, which is always ready to act upon the written law, is itself acted upon by custom; it being the practice of judges to accept the 'usual' interpretation of a law as the true one.

Influence
of lawyers

It also makes a very great difference whether the manipulation of these processes remains in the hands of unprofessional persons, or falls into those of trained lawyers. In the ordinary course of national progress, as soon as the usual division of labour takes place, the latter event will happen. But the lawyers must always in the main exert their influence not by separating themselves from the current ideas of the community to which they belong, but by representing those ideas, and

mainly a
popular
one.

¹ The old village courts (Schöffengerichte) mentioned by Savigny no doubt based their decisions entirely upon customs, though the practice of drawing up records of their decisions (Weisthümer) probably gave a decided preponderance to the judicial over the popular element. The tendency to substitute written rules for oral tradition appears everywhere in the West, even in lay tribunals. In the East the tendency towards the production of written laws is not so marked.

putting them into legal shape. The lawyer class does not come into existence suddenly. Lawyers are generally first found giving advice only, either in cases of dispute, or as to the performance of the proper solemnities in legal transactions. From this they generally proceed to draw up formularies or guides for the transaction of business ; and it is only later still that they venture to deal with law theoretically, either in written treatises or by oral teaching. Gradually also under their influence the decisions of the courts assume a different tone : from being mere dry adjudications of the matter in dispute they come to be reasoned out, and acquire a more or less scientific character. A tradition also of a special legal kind, apart from ordinary custom, grows up about the courts which largely influences the decisions of the judge. It is when law has arrived at this stage that interpretation becomes most artificial, and serves, perhaps, only to veil the process of innovation. Unchecked by public opinion it would be intolerable, but under this restraint it produces useful results. For it must never be forgotten that, whether the law be interpreted so as to cover an increasing area of cases, or whether customary rules be imported into the law, it is never a mere arbitrary modification or extension of the law which thus takes place, but a formulating of the popular ideas by a skilled class. On the other hand, without the skill of the lawyer society would scarcely make any advance at all. Contrary to what is generally supposed by those who have paid no particular attention to the development of law, it is the lawyers who have generally made the first advance by breaking through the stiffness of early forms and the rigidity of ancient rules. Lawyers have been frequently attacked as being too technical, just as they have been frequently attacked for the assumption of unauthorised power : and doubtless, at different times, they have been made justly liable on both charges. But the general observation remains true, that large and beneficial reforms in the law have been made by lawyers, and very few could have been made without them. This could hardly be

otherwise. The law may correspond to the legal culture of those who produce it; it cannot go beyond it.

Develop-
ment of
Roman
law.

82. I will now endeavour to illustrate the growth of law more particularly by a glance at the development of law in certain countries of the ancient and modern world. I shall refer to the influences which have operated upon the law of Rome, upon the Hindoo law, upon the Mahommedan law, upon the law of continental Europe, and upon the English law. Beginning with the law of Rome we find that the early law was gathered up, as early as the fourth century before Christ, into a code which is known as the Twelve Tables. From that time forward the legislative power was always at hand, but nevertheless the most important modifications of Roman law were brought about by other influences. Taking the law of the Twelve Tables as their text the Roman jurists busied themselves about its interpretation, and with much dexterity developed from this rude code rules of law suitable to the growing wants and complicated relations of a thriving and active community. Still more largely was the Roman law affected by an influence which has been called equity. This is a term which has been used to describe a great many influences which have some similarity to each other, but are not identical. To a great extent equity, as administered at Rome through the prætor's edict, was custom of a very general kind. The source from which it was, in a great measure, derived was, as is well known, the 'jus gentium,' or 'jus commune omnium gentium,' subsequently identified with the 'jus naturæ.' The practical result was that forms which had become too cumbrous for use were dispensed with; principles which had been found too narrow were expanded; and laws which had become unsuitable were ignored. Custom also, in the narrower sense of the practice prevailing at Rome in the whole or in some section of the community, was constantly being imported into the law, but always through the hands of a skilled juriconsult, or of a prætor who, though not necessarily himself a lawyer, was completely under the lawyer's in-

fluence. The issue of the edict by the prætor was a process more like legislation than a creation of law by a modern English judge, in that it announced beforehand in an abstract form the rule which would be applied. But a rule so issued was only binding on the prætor who issued it. This curious method of creating law is almost unintelligible unless we remember that the prætor, as representing the sovereign power, was supreme as to the matters which it actually fell to him to decide; and that he was exercising this supreme power under the important restriction that all his proceedings were watched by competent and jealous critics. Practically, therefore, each prætor followed in the footsteps of his predecessors, adopting only such well-considered changes as were pretty sure to be acceptable.

83. Turning to the Hindoo law, we do not find any distinct epoch when it was first reduced into a written form, but we have a number of so-called codes, of which the code of Manu is the best known and most influential. These codes are the written basis of all subsequent Hindoo law. They have a double aspect; being as much religious as legal.

It is doubtful whether any of these codes, though they now bear the name of an individual, are the product of a single hand; or even of a single age. It is more probable that they represent ancient texts in a more or less modified form. The form in which they now exist is said to indicate a comparatively modern date, but this seems to me not very material, because there is internal evidence that in substance they belong to a very early stage of society. For example, in the so-called code of Manu we do not find the ownership of land at all dealt with, undoubtedly because it was not yet known. So too the conflict of rights between individual members of the family had scarcely yet attracted legal notice. Nor had the widow asserted any independent rights. So far as she appears to have had any rights at all, it was as head of the household after her husband's death, which looks like

Develop-
ment
of the
Hindoo
law.

Antiquity
of the
Hindoo
codes.

a survival of polyandry¹. Whenever, therefore, this code may have assumed its present form, it is certain that its matter belongs to a very early period². But the code of Manu, venerated as it still is, and antiquated as it is, has not placed an insuperable barrier in the way of advance. Fortunately the code itself contains a recognition of the influence of custom, and so far from discountenancing this influence it expressly encourages it. 'The king,' says Manu, 'who knows the revealed law [ought] to inquire into the particular usages of trades and the rules of certain families, and to establish their particular laws³.'

Brahmin-
ical influ-
ence upon
law.

The Hindoos themselves did not fail to recognise and make use of this latitude, and by means of custom and interpretation largely developed the Hindoo law. These processes were for a long time chiefly in the hands of learned Brahmins, who were neither skilled lawyers, nor priests, nor a simple aristocracy, but something of all three⁴. Still, having no official position their real claim to influence depended upon their personal qualifications, and chiefly upon their learning. The formal process which they adopted was that of writing commentaries on the older written law. But these commentaries, though mostly couched in the language of interpretation, are to a large extent occupied in engrafting new

¹ Manu, chap. ix. sect. 104. See also chap. viii. sect. 416.

² The date of the code even in the form in which we possess it seems to be still unsettled; but the statement in the text that in substance it belongs to an early stage of society is, I think, incontrovertible. Like the Twelve Tables, it may have been considered a *carmen necessarium* long after it had been largely supplemented by custom and interpretation.

³ Manu, ch. viii. sect. 41, 'if,' adds a commentator, 'they be not repugnant to the law of God.' But the original author did not think this precaution necessary.

⁴ There is some analogy between the position of learned Brahmins and the Pontifices at Rome. I do not observe that the Brahmins, like the ecclesiastical lawyers of Europe, have endeavoured to use their influence for promoting the interests of a class. This accusation has been brought against them, but I have not seen any evidence of it. The learned Brahmins who wrote the great commentaries mixed, I imagine, very little directly in the management of human affairs, and they seem to have been animated by a very lofty spirit.

customs upon the old rules, and in pointing out (with many apologies by the authors for the degeneracy of the times in which they wrote) the rules which had become obsolete. The value of these commentaries depends solely upon the reputation of the persons by whom they were compiled; but, like the Institutes of Lord Coke, they are authority and not mere literature. The Hindoo law is now administered by British courts of justice in which the judges are partly native and partly European. Under their influence the development of law by interpretation and by the recognition of custom has been actively continued, and it has been accelerated by a third process which I shall explain presently, the creation of law by judicial decision¹.

84. The Mahommedan law rests also on a written basis, the Koran, which, like the Hindoo Shasters, is divine, but, being comparatively modern, bears much more directly upon the ordinary affairs of life. There is not, therefore, the same room for development, and there is no admission in the text of the Koran of the necessity or the propriety of any modification of its precepts. Even in Europe, where Mahomedans have become familiar with the exercise of legislative functions both in the modern form, and in the form of the imperial legislation of Rome, they have rarely ventured upon a development of their law by this direct process. In a few instances, as, for example, the acceptance of interest for a loan, the precepts of the Koran have been departed from, but every judge professing to administer Mahommedan law, and every ruler professing to be guided by its principles, is loaded with fetters. The Mahommedans have made scarcely any

Develop-
ment of
the Ma-
homme-
dan law.

¹ The British courts in India, and especially the European judges, have been accused by some of paying too much, and by others of paying too little, attention to the commentators. As a matter of fact the courts in India have innovated very largely, and it is not a little remarkable that modern Hindoos, who will not tolerate any interference with their law by a legislature, have always accepted with deference the decisions of our tribunals even when they have been counter to popular feeling. This is especially so with the decisions of the Privy Council, but all the High courts have from the first been liked and respected by Hindoos.

attempt to free themselves from this thralldom. They seem to be paralysed by a sort of superstitious feeling that it would be irreligious to doubt that the word of the Prophet was sufficient for the wants of mankind even twelve centuries after it was spoken. A certain amount of the old Arabian custom was, no doubt, assumed by Mahommed, and has always remained in force, though not expressly recognised¹; and at some time or other the Mahommedan lawyers seem to have come temporarily under the influence of the Latin jurisprudence to their very great advantage. Traces of this influence may be easily discovered in the great commentary of Khalil Ibn Ishak translated into French by M. Perron, and a commentary much used in India called the Hedaya. But now the Mahommedan law seems to have become so unprogressive that it is impossible for a nation to advance under it.

Develop-
ment of
law in
modern
Europe.

General
adoption
of Roman
law.

85. I now pass on to the development of law in modern Europe, where we come upon an entirely new phase. None of the great nations founded on the continent of Western Europe after the fall of the Roman Empire have constructed an independent legal system of their own. France, Italy, Austria, Germany, Holland, and Spain have every one of them adopted the Roman law as their general or common law, and have only departed from it so far as particular occasions might require. Every gap not filled up by special legislation, or specially recognised custom, has been supplied from the Roman law, and even their modern codes to a very large extent only contain the ideas of the *Corpus Juris* in a nineteenth-century dress.

History of
the pro-
cess.

86. The history of the process by which the Roman law became the common law of the Western portion of the

¹ The male agnates (asabah, whom we incorrectly call residuaries) are not mentioned, even casually, in the Koran; yet they occupy an undoubted and important position as heirs. The old Arabian law of inheritance gave them, no doubt, the entire inheritance, and this rule was modified by Mahommed, who directs the setting apart of certain shares before the division amongst the residuaries takes place. See post, sect. 786.

European continent can only be referred to here with extreme brevity and in its broadest features¹. It commences, of course, when the Goths, the Burgundians, the Franks, and the Lombards began to found new kingdoms upon the ruins of the Roman Empire. In none of these were the Roman citizens deprived of the enjoyment of their own laws. The conquering invaders and the conquered inhabitants lived side by side each under their own system, just as the natives of India and Europeans do at the present day²; and when the German races began to conquer each other, especially when several of them were united by Charlemagne under one Empire, the same forbearance was exercised. Each person retained the law indicated by his birth, so that you could find side by side not only two systems, a Roman and a barbarian, but several systems, a Roman, a Gothic, a Burgundian, a Lombardic, and so forth. It is the conflict of laws thus produced to which Bishop Agobardus refers in his letter to Louis le Debonaire when he says, 'it often happens that five men each governed by different laws, may be found sitting or walking together³.'

¹ It will be found at length in Savigny's *Geschichte des Röm. Rechts im Mittelalter*, the first volume of which has been translated by Cathcart (Edinburgh, 1829).

² The parallel often drawn between the relative position of the German conquerors and the conquered inhabitants of Europe, and that of the English and natives in India, is in some points a striking one, but there is this capital distinction, that in one case the conquered, in the other the conquering, race are the higher in civilisation.

³ Savigny, *Gesch. d. R. R. im Mittelalter*, vol. i. § 30. The notion that every one had a free choice (*liberum arbitrium*) as to the law by which he would be governed has been exploded by Savigny. The law of a man was determined by his descent. So was that of a single woman and widows. A married woman could choose between the law of her father and that of her husband. The Clergy were governed by the Roman law. Bastards had the right of choosing their law: and in private transactions the parties could agree as to the law which was to govern the transaction. Just in the same way in India, until recently, a party used frequently to be brought into a transaction as (what was called) 'jurisdiction trustee' in order to ensure, in case of dispute, the case being tried before the Supreme Court according to English law. See also *Abraham v. Abraham*, Moore's Ind. App. vol. ix. p. 195.

Law in
Europe at
one time
personal.

87. At this period law was personal: that is, a man took the law of his parents simply by reason of his descent, and not because he or they were domiciled on any particular spot or owed allegiance to any particular ruler. Subsequently law became territorial; that is to say, a given body of law was made applicable to a district marked out by geographical limits, and applicable to all persons within those limits, because of their inhabitancy and their consequent allegiance to a single government. The influence under which a territorial law and territorial sovereignty were arrived at was, I conceive, feudalism. Wherever feudalism prevailed the tenant began to take his law from the land and not from his descent¹.

Law be-
came ter-
ritorial
under the
influence
of feudal-
ism.

88. But we have still to see how the several Barbarian laws became welded together with the Roman law and with that which we call the feudal system into one compact body of law for each country. How did the descendant of the Roman citizen and the descendant of his barbarian conqueror come each to lose his distinctive rights? Of this we know but little. But the amalgamation probably commenced at a very early period after the barbarian conquest: and this amalgamation would be greatly facilitated by the circumstance that even the barbarian laws consisted of something more than the rude customs which these tribes had brought with them from their native forests. The *leges barbarorum* all bear obvious traces of having been themselves influenced by the Roman law. This however is for the most part not the Roman law of Justinian, but of the earlier Hermogenian, the Gregorian, and the Theodosian Codes².

¹ The combination of the notions of universal empire with universal citizenship might have the same practical results as the rendering of all law territorial, but would not necessarily beget the conception of territoriality.

² It used to be thought that for a time the Roman law was wiped out of Europe, and that it was revived again upon the discovery of the *Corpus Juris* at Amalfi when that city was taken by the Pisans in 1135. The Pisans are supposed to have carried away this, the only copy in existence in Western Europe, as part of their booty, and the emperor Lothair the

Language, literature, education, and above all, commerce, were on the side of the Roman lawyers. Still it is not without astonishment that we find the law of the conquered silently displacing the law of the conquerors, and the Roman law adopted everywhere as the law of the land. This adoption of the Roman law took place rapidly after the twelfth century. A flourishing school of Roman law arose at Bologna, and another at Paris immediately after; and the *Corpus Juris* became the general source of law throughout the continent of Western Europe¹.

89. In England alone we find the overwhelming influence of the Roman law successfully resisted. True it is that not a few maxims of the Roman law have been transferred to English law, and, avowedly or unavowedly (for the most part unavowedly), the doctrines of the Roman law have largely influenced the opinions of English lawyers; but no one has ever been able to quote a text of the Roman law as *authority* either in the courts of common law or in the courts of chancery. It was only within the very narrow jurisdiction which the ecclesiastical courts managed to secure, and in the comparatively insignificant affairs of the admiralty courts (which dealing with foreigners felt the want of a universal law), that the Roman law was accepted. For a long time the ecclesiastics struggled to procure for it a more general acceptance. The crown generally leaned in its favour², though

Influence of Roman law resisted in England.

Second (so the story goes) ordered it to be used as law throughout his dominions. It has been shown by Savigny that this is an altogether mistaken view of the fate of the Roman law prior to the twelfth century. See *Gesch. d. Röm. Rechts im Mittelalter*, vol. iii. §§ 35 sqq.

¹ See Weiske's *Rechtslexicon*, s. v. *Quellen des deutschen Rechts*, vol. viii. p. 846; Brunner in *Holtzendorff's Encyclopädie* (ed. 1882), p. 266. Theoretically the Roman law was held binding because the German Empire was considered to be a continuation of the Roman. In the north of France (*Pays Coutumier*) the Roman law was never, strictly speaking, the common law, but still it had a powerful influence as *raison écrite*. 'Ultimo vero loco e jure scripto Romano mutuamur, quod et aequitati consonum et negotio de quo agitur aptum congruumque invenitur.' Dumoulin, § 110. tom. i. p. 23. Pothier, *Œuvres*, éd. Bugnet, tom. i. p. 2.

² Besides the servile maxim so often quoted, 'quod principi placuit legis

occasionally, under the influence of the fear that its introduction might throw too much power into the hands of the church, the sovereign cast his weight into the other scale. But the English lawyers as a body never wavered. The judges with a dogged persistence kept the *Corpus Juris* as an authority out of their own courts, and restrained the ecclesiastical courts if they attempted to interfere in matters which did not belong to them. The nobility and the commons were equally opposed to the introduction of Roman law. It must at times have been a hard struggle to maintain against the learning and influence of the clergy the ruder customs of England, to which Glanvil, Fleta, and Bracton can scarcely bring themselves to allow even the name of law¹. And all the writers I have named attempted to introduce the principles of Roman law into English courts by incorporating them into works professing to treat of the laws and customs of England. But this attempt to treat the rules of Roman law as authoritative met with little success. It was perhaps due to this very admixture of Roman law that the authority of even so accomplished a writer as Bracton was repudiated so emphatically by the judges².

habet vigorem,' which Bracton qualifies, there is much in the *Corpus Juris* which flatters and favours despotism.

¹ '*Cum autem fere in omnibus regionibus utantur legibus et jure scripto sola Anglia usa est in suis finibus jure non scripto et consuetudine. In ea quidem ex non scripto jus venit, quod usus comprobavit. Sed absurdum non erit leges Anglicanas (licet non scriptas) leges appellare, cum legis vigorem habeat quicquid de consilio et de consensu magnatum et reipublicae communi sponsione autoritate regis sive principis praecedente juste fuerit definitum et approbatum.*' Bracton, chap. i. s. 2.

² In a case quoted by Fitzherbert in his *Abridgment* (Garde 71), decided in the 35 Hen. VI, the court is represented as agreeing that 'Bracton was never accepted as an authority in our law.' So in the case of *Stowel* against *Lord Zouch*, in *Plowden's Reports*, vol. i. p. 357, Saunders' argument is thus reported: 'And to this purpose he cited Bracton, not as an author in the law, for he said that Bracton and Glanvil were not authors in our law, but he said he cited him as an ornament to discourse where he agrees with the law.' As far as I am aware, neither Bracton, Fleta, nor Glanvil are ever quoted in the *Year Books*. Reeves (*Hist.* vol. iv. p. 186) says that Bracton is 'once or twice' referred to, but

90. The resource of the English lawyers when called on to fill the gap which was elsewhere supplied by the Roman law was custom, usually called by us the common law. Of this custom the judges were themselves, in the last resort, the repository. But the judges usually observed a discreet silence as to the source from which they derived the rules upon which their decisions were based. Here and there a judge or a counsel *arguendo* would mention a precedent, but if we may trust the reports contained in the Year Books, even this was rare. Still there appears to have been very little tendency to innovation; and there was doubtless a tradition of the courts to which every judge knew that he must conform at the peril of his reputation. Some record of the proceedings of the superior courts of justice was always kept, and we have a series of such records commencing as early as the 6 Ric. II (1394). These early records might, and probably did, afford ^{Custom took the place of the Roman law.} ^{Character of the early reports.} he does not give the references. It may be said that it was not the practice in former times to quote books. That practice seems to have come in after the reformation very gradually, first by reference to Littleton's Tenures, then to Coke's edition of that book, and then to Coke's own works. Other books have by degrees crept in since. But the value attached to a work may be fairly estimated by the demand for it, and of this we have a pretty clear indication. Littleton's Tenures was printed in 1481, again shortly after without date, again in 1528, again in 1543, again in 1572, and I think there were other editions. The Year Books, Fitzherbert's Grand Abridgment, a variety of books on the manner of holding courts, a book called the Justice of the Peace, Fitzherbert's *Natura Brevium*, and several other law-books were frequently printed during the same period. Britton, on the other hand, was not printed at all until 1530; Bracton was not printed till 1569; Glanvil not till 1557; and Fleta not till 1647. And the demand for these books has never increased; none of them have been reprinted more than once until recently. They are now being printed chiefly for purposes of historical research. I am not aware upon what authority the oft-repeated statement of Bracton's influence on English law rests. It may be that Bracton's book was used privately by English lawyers to a much larger extent than appears, and that the judges were influenced by it without acknowledging their obligation: whether this was so, or whether they studied the Roman law in any other work, I have no means of judging. Of course, the extent of the influence of Roman on English law cannot be measured by the value which English lawyers have attributed to the work of Bracton, but it still remains a most important fact that the *authority* of the Roman law has always been repudiated in England.

some guide in future cases, though they were not drawn up with that object. Moreover, at least as early as the reign of Edward I the practice was begun of drawing up, in addition to these records, reports of cases heard and determined, the main, and apparently the sole object of which was to furnish judges with precedents to guide them in their future decisions. In these Year Books there is very little argument, but only an ascertainment by oral discussion of the points at issue with the decision of the court. The reporter however frequently criticises the decision, and sometimes indicates in a note the general proposition of law which he supposes the decision to support. Reference is also sometimes made by the reporter to other cases involving the same point. The later Year Books give the arguments somewhat more fully, but still we do not find previous cases frequently cited. From this we might be disposed to infer that the practice of citing cases in support of an argument or a judgment was still very rare even in the reign of Henry VIII, when the last Year Book was published. Yet this can hardly be so, for the reports of Plowden in the reign of Edward VI, which are much fuller than the latest Year Books, show that cases were at that time freely cited, and it is not likely that the practice came suddenly into existence. Moreover, we can scarcely account for the existence of the Year Books at all unless we suppose that the lawyers studied them and made some use of them. The importance attached to the Year Books is further shown by the numerous reprints of them which were issued as soon as the art of printing was discovered, and also by the popularity of the abridgments made of them by Fitzherbert and Brooke. Probably, therefore, the influence of precedent upon the decisions of the judges is not to be measured by the number of cases quoted in the Year Books.

Practice
of citing
cases.

Decisions
became in
later times
authori-
tative.

91. It is, however, always as indicating the custom of England, and not as authority, that the decisions of earlier judges were cited during all this period and even afterwards.

In the patent of James I¹ for the appointment of official reporters it is indeed recited that the common law of England is principally declared by the grave resolutions and arrests of the reverend and learned judges upon the cases that come before them from time to time, and that the doubts and questions likewise which arise upon the exposition of statute laws are by the same means cleared and ruled. Nevertheless we find Blackstone still saying that the first ground and chief corner-stone of the laws of England is 'general and immemorial custom. But long before Blackstone's time, and in some measure perhaps owing to the patent of James I, a very important change had taken place in the view held by judges as to the force of prior decisions. These decisions were at first evidence only of what the practice had been, guiding, but not compelling, those who consulted them to a conclusion. But when Blackstone wrote, each single decision standing by itself had already become an authority which no succeeding judge was at liberty to disregard. This important change was very gradual, and the practice was very likely not altogether uniform. As the judges became conscious of it they became much more careful of their expressions, and gave much more elaborate explanations of their reasons. They also betrayed greater diffidence in dealing with new cases to which no rule was applicable, cases of first impression as they were called; and they introduced the curious practice of occasionally appending to a decision an expression of desire that it was not to be drawn into a precedent.

92. Thus it comes to pass that English case law does for us what the Roman law does for the rest of Western Europe. And this difference between our common law and the common law of continental Europe has produced a marked difference between our own and foreign legal systems. Where the principles of the Roman law are adopted the advance must always be made on certain lines. An English or American

General case law as compared with that of the Roman law.

¹ Pat. 15 Jac. I., in vol. vii. part 3. p. 19 of Rymer's *Foedera*, ed. 1741. Blackstone, Comm. vol. i. p. 72.

judge can go wherever his good sense leads him. The result has been, that whilst the law of continental Europe is formally correct it is not always easily adapted to the changing wants of those amongst whom it is administered. On the other hand, the English law, whilst it is cumbrous, ill-arranged, and barren of principles, whilst it is obscure and not unfrequently in conflict with itself, is yet a system under which justice can be done. Anyhow it stands alone in the history of the world. The records of decisions have no doubt at all times and in all countries served as evidence of custom, just as the Year Books formerly served, and the court rolls of manors still serve, amongst ourselves. And even without the influence of custom judges are never likely to disregard or to remain uninfluenced by the decisions of their predecessors. But nowhere else than in England and in countries which have derived their legal systems from England have the decisions of judges been systematically treated as authoritative. There seems to have been a good deal of fluctuation under the Roman law as to the authority to be attributed to the imperial rescripts and decrees given in particular cases. Still if these were ever treated as generally binding it seems to have been because the Emperor was himself the supreme source of all authority, and could legislate when and how he pleased. But no decisions of any tribunal had, as such, any authority whatsoever. ‘*Nemo judex vel arbiter existimet consultationes quas non rite judicatas esse putaverit sequendum, cum non exemplis sed legibus judicandum sit.*’ Nearly all modern continental codes contain similar prohibitions, and this is the modern continental practice¹.

¹ ‘The opinions of law professors and the views taken by prior judges shall not be in any way considered in future decisions.’ *Allgem. Land-Recht*, Introduction, s. 6. The stringent provisions of the French Code have been already referred to. (See note to sect. 26.) Of course provisions of this kind do not prevent judges from resorting to the opinions of those who preceded them for guidance, and this inevitably results in these opinions producing an influence which is of great importance, though widely distinguished from the ‘authority’ of English decisions. French judges really rely on such opinions when they refer to ‘*la doctrine et la*

93. Well established as the practice of the judges to make the law has now become in England, it is not easy to reconcile ourselves to the notion when the practice is brought under our observation. The explanation of it is the delegation to the judges of what was once a peculiar function of sovereignty. If we look at the history of all early societies we find that the principal duty of the sovereign, in time of peace, is not the making of law, but the decision of law-suits. It is the king himself who decides all disputes between his subjects; he is the judge before whom the issue is tried¹; and whilst in some of the oldest treatises on law we find the judicial function of kings carefully and prominently considered, the legislative function is scarcely noticed. This is notably the case in the treatise of Manu, where the king is always spoken of as 'the dispenser of justice,' and his duties as such are minutely laid down; whereas I do not recollect a single passage which enjoins him to make wise and good laws. Nor does this in any way result from the claim of Hindoos to have received a divine revelation. We find the same thing in societies which lay no such extensive claim, and indeed which hardly claim at all to have received commands direct from God.

Jural
basis of
authority
of case
law.

94. Even in England, where Austin thinks the judicial function was more completely separated from the legislative than in any other country², we find strong indications of the extent to which those functions were mixed in early times. The present judicial authority of the House of Lords is generally traced to its representation of the *Aula Regis*, which was at the same time the supreme court of justice

jurisprudence' or 'le point de vue juridique.' German judges seem to have no hesitation in referring to treatises, and to the *Gerichtsgebrauch* or *usus fori*. Thus a kind of customary law (*Juristenrecht*) is formed by the courts, but Unger says that it cannot be applied by the courts in Austria, because the application of all customary law is forbidden by legislation. (Unger, *Syst. d. öster. Privat-R.*, vol. i. p. 42: Austrian Civil Code, s. 12.) I should doubt if such legislation could ever be effectual.

¹ See Grote's *History of Greece*, Part I. ch. xx.

² *Lect. xxviii. p. 536* (third edition).

and the supreme legislative assembly in the kingdom. It required a special clause in Magna Carta to enable the Court of Common Pleas to sit anywhere except in the place where the king happened to reside. By a fiction the sovereign is always supposed, even at the present day, to preside in person at every sitting of the Court of Queen's Bench; and it is as keeper of the king's conscience that the chancellor is said to exercise his authority.

Idea of
law pos-
terior to
that of
judicial
decision.

95. The truth is, as Sir Henry Maine has shown¹, that the idea of law itself is posterior in date to that of judicial decision; and it was the actual observation of a succession of similar decisions of the same kind which gave rise to the idea of a rule or standard to which a case might be referred. As soon as this observation was made every one would naturally recognise the advantage of stating in an abstract form the rule which might be inferred from a series of uniform decisions, and which, it might be reckoned with tolerable certainty, would be applied, whenever a similar dispute should arise. This was the first germ of law: and the first recognised laws were probably collections of the scattered rules which had thus come to be adopted.

Delega-
tion of
judicial
office by
sovereign.

96. It was only in the simplest condition of society that the king could really be also judge in all matters of litigation. At a very early period this function of sovereignty would be delegated to persons whose duty it was to decide disputes and punish offences. The wise, and learned, and elderly persons, who sat with the king to assist him with their advice, would be deputed by him to decide cases in his absence. But this change in the person of the judge would not materially affect either the character of the office or the exercise of the function. The same repetition of cases would occur: by deciding them successively in the same way, the subject judge, just like the sovereign judge, would give currency to certain rules, and these rules would come to be looked upon as law.

¹ Ancient Law, p. 5 (ed. 1861).

97. The process by which law is made by judges in the exercise of their judicial function has been undoubtedly misunderstood. It has been said, that the exercise by judges of the legislative function at all is a usurpation. If by the exercise of the legislative function be meant the evolution of law by the process above described, this statement is the very reverse of truth. A judge who merely substitutes for his own opinion the concurrent opinion of others is no breaker of the law. The only result of saying that judges could make no law, would be to say, in effect, in a large number of cases, that there was no rule of law applicable to the purpose in hand, and to leave the judge entirely uncontrolled.

Judicial making of law not a usurpation.

98. A very much more important question has been raised, as to the correct appreciation of the process of making law by judicial decision. Austin has minutely criticised this process, but the published Lecture which contains these criticisms is, as is so frequently the case with the scanty remains we have of the writings of that eminent jurist, made up of two disjointed fragments; and it is of course, therefore, not summed up into any final conclusions. It appears to me that the essential difference between the generation of law by judicial decision and by express legislation lies in two of the characteristics of judiciary law noted by Austin,—namely, that it is *ex post facto*, and that it is always implicated with the peculiarities of the particular case in which it is applied. All the objections which can be raised against judiciary law may be traced to one or both of these characteristics; its bulk, the difficulty of ascertaining it, its inconsistency, and so forth. To the combination of these two characteristics may be also traced its great, though possibly its only advantage—that of flexibility, or capacity of being adapted to any new combination of circumstances that may arise. Were the judges in England compelled, as in Italy, France and Spain, and as has been attempted in India, to state separately and fully what French lawyers call the *motives*, and Spanish lawyers the *points* of their decisions

Characteristics of judiciary law.

—that is to say, their findings in fact and the rules of law which guide them—there would be a complete revolution in the history of English case law. The law being stated in distinct propositions, altogether separate from the facts, would be easily ascertained. This, coupled with our notions as to the authority of prior decisions, would render a conflict so conspicuous, as to be almost impossible. The law would soon become clear and precise enough; but so far as judicial decision was concerned, it would become much more rigid. It is because English judges are absolved from the necessity of stating general propositions of law, and because, even when these are stated, they are always read as being qualified by the circumstances under which they are applied, that our law remains bulky and uncertain, but has also, in spite of our respect for precedent, remained for so long a period flexible. Whether it would be found possible to combine our practice as to the generally unquestionable authority of prior decisions, with the practice of laying down abstract propositions of law separate from and independent of the particular facts, is an experiment which, as far as I am aware, has not yet been tried¹.

Process of reasoning by which it is extracted.

99. The nature of the process of reasoning which has to be performed in order to extract a rule of law from a number of decided cases by elimination of all the qualifying circumstances, is a very peculiar and difficult one. The opinion of the judge, apart from the decision, though not exactly disregarded, is considered as extra-judicial, and its *authority* may be got rid of by any suggestion which can separate it from

¹ The High Court at Calcutta has gone somewhat near it, by requiring even its own members, when they differ in opinion on a matter of law, to refer the difference to the arbitration of a majority of the whole Court. This sometimes leads to the enunciation of propositions of law in an abstract form, which it is made imperative on all the members of the Court, and of course on all the inferior Courts, to accept, until overruled by the Privy Council. See Rule of High Court of Calcutta of July 1867, in Mr. Broughton's Civil Procedure, p. 710 (fourth edition). The government saw no usurpation of power in this proceeding: on the contrary, the rule is said to have been made at the suggestion of government.

the actual result. Unless, therefore, a proposition of law is absolutely necessary to a decision, however emphatically it may have been stated, it passes from the province of *auctoritas* into that of mere *literatura*. Curiously enough it is not the opinion of the judge, but the result to the suitor which makes the law¹.

100. Paley has called the process by which law is extracted from a series of decisions the competition of opposite analogies². Austin considers that this process is not necessarily confined to the extraction of law from judicial decisions, and that it may as well be employed in the application of ascertained rules of law to particular cases. But, as I have said³, it is the peculiarity of English judges that they do not think themselves bound to distinguish these two operations, and that they very frequently perform them simultaneously. They, in fact, determine the law only *by applying it*. And I think Paley's description of forensic disputation and judicial decision is both forcible and accurate. 'It is,' he says, 'by the urging of the different analogies that the contention of the bar is carried on; and it is in the comparison, adjustment and reconciliation of them with one another, in the discerning of such distinctions, and in the framing of such a determination as may either save the various rules alleged in the cause, or, if that be impossible, may give up the weaker analogy to the stronger, that the sagacity and wisdom of the court are exercised.'

101. Closely connected with the law which emanates from a series of judicial decisions is the law which is derived from the commentaries of great jurists. These are also

Competition of opposite analogies.

Third source of law: Commentaries.

¹ This is consistent with the idea that the basis of the law which comes to us through judges is custom, and not opinion.

² Moral Philosophy, vol. ii. p. 259. Austin seems to have thought at first that Paley was speaking only of the application and not the extraction of law. (Lect. xxxvii. p. 653.) But he afterwards changed that opinion. (Fragments, p. 1031.) Very likely Paley did not, any more than judges, distinguish the two processes.

³ Supra, sect. 98.

expounders of the law, and their works are constantly read and referred to in courts of justice, and have the very greatest weight.

102. The authority of a commentator cannot, however, like that of a judge, be traced immediately to the sovereign, and, as a general rule, a commentary when it first appears is only used as an argument to convince, and not as an authority which binds. But just as judges by successive decisions give currency to custom as a rule of law, so by successive recognition they establish the authority of a commentator; till at last the opinions which he has expressed count for as much, or even more, than the opinions of the most eminent judge. This is the case with such commentaries as those of Lord Coke, Lord Hale, and Littleton in England; the *Dayabhaga*, the *Mitacshara*, and the *Hedaya* in India.

Difference
in form
between
commentaries and
judiciary
law.

103. Between commentaries and judicial decisions there is a distinction of form which it is important not to overlook.* Judicial decisions are, as we have seen, by their very nature concrete; all the judge professes to do is to decide the case before him; and the principle of law which guides him has very often to be extracted with much labour and difficulty. But the commentator not unfrequently deals with matters entirely in the abstract. He lays down propositions of law capable of being applied to a whole class of cases; he infers one principle from another; he foresees new combinations and provides for new results. A commentary of this character, when once its authority is established, is far more comprehensive than any number of volumes of reports; but very few treatises of this kind, and scarcely any modern ones, have attained the necessary standard of reputation.

Divine
law.

104. I have not, as will have been observed, made either the divine law, the law of nature, or the moral law, separate sources of law; and I do not think that they ought to be so made, although many learned persons strenuously maintain the contrary. The terms themselves are very vaguely used, but I think by divine law is generally meant that body of

rules which is set by God to man through inspired revelation¹. Nearly all nations claim to be possessed of some such revelation, but the nature of it differs considerably; and the relation which these revealed rules bear to law, in the proper sense of the term, also varies very greatly.

105. Christian nations lay claim to nothing more than a revelation of certain doctrines of religion and certain very general rules of morality. The Author of the Christian faith, though repeatedly appealed to for that purpose, always refused to interfere in questions of a political character, or to lay down specific rules of conduct. Christians.

106. The Greeks and Romans had scarcely any notion of a divine revelation at all, in any sense which we should attach to the term. The divine communications which they received were rather in the shape of advice or warnings how to act on some special occasion. If it was supposed that there had been at any time persons, who spoke habitually under divine inspiration, these were not sages who directed the conduct, but poets who stirred the feelings and imagination of their hearers. Greeks and Romans.

107. The Hindoos, whilst they too have been largely influenced by a mythic poetry of supposed divine origin, have also, as I have already mentioned, a very distinct revelation of the will of God. And this revelation is quite as much occupied with the ordinary affairs of daily life as with the regulation of religious observances. The general moral precepts are few, and, consequently, its actual influence on the modern life of a Hindoo is not very great. Hindoos.

108. The extent to which Mahommedans are still under the influence of a divine law I have already explained. They have carried the notion further than any other people except perhaps the Jews of old, who for a long period claimed to be Mahommedans and Jews.

¹ Rules of conduct, not actually revealed, may also be referred to a Divine Author, and, I believe, are sometimes called divine, but I am at liberty to restrict the expression 'divine law' as I have done, and as it is convenient to do; comprising the unrevealed rules, as is more commonly the practice, under moral law, or law of nature.

under the direct personal government of God Himself, and to be in constant communication with Him. It appears that the Jews felt at times this form of political society to be inconvenient, and the traces of a struggle to obtain a different constitution are to be found in the Bible, where we read that they desired to have a king 'like all the other nations'.¹ And though they are rebuked for their ingratitude their prayer is at last granted. But the Jews never seem to have arrived at any very clear notions about law, at least not about their own law.

Divine
laws not
always
enforced.

109. Modern nations have recognised a very important principle as to the application of divine rules by human authority, that some divine rules are not to be so enforced. No one, whatever he might pretend, could practically assert the contrary: and there seems, therefore, no help for it but to admit that the law, as a human institution, takes the highest standard of morality of which it is capable, but which still leaves something unfulfilled. The Mahommedan law supplies one example of this in the recognition of the lawfulness of taking interest for the use of money, though I still doubt whether a Mahommedan, if asked, would acknowledge any distinction in the obligatory force of divine precepts. We find other and clearer examples in the various cases in which under nearly every system of law a man is relieved from the fulfilment of his promise under certain circumstances. In the case of infancy, for example, the debt incurred by the infant is not enforced, but very often he ought, nevertheless, to pay it. A curious case of this kind occurred early in our administration of justice in India. The Hindoos of Lower Bengal generally desired that as between father and son the father should have power to dispose of the family property. The English judges were by no means unwilling to grant this power to them, but some very plain precepts of divine authority stood in the way. The Hindoos thereupon enunciated the convenient maxim, that a sale once made could not be set aside, because 'a fact

¹ 1 Samuel viii. 5.

cannot be altered by a hundred texts.' The English judges capped this with a Latin maxim, 'Fieri non debet, factum valet.' And no one has ever since questioned the power of alienation¹.

110. But though the operation of divine law has been thus limited, it would be idle to deny that it has indirectly had a large influence upon law. To deny this would be to deny that a large portion of mankind has had any sincere religious belief at all. Still it is impossible to admit, as Blackstone and some other English lawyers seem to assert², that there is implied in every human law some sort of reservation or exception in favour of the divine law; a *salvo jure divino* absolving men from obedience to the human law if it conflicts with the divine. This proposition is not the less objectionable because it is capable of being read in a sense in which it is not untrue. If Blackstone meant that a conscientious man, with a firm and well-grounded conviction that there existed a conflict between a particular divine and a particular human injunction, ought to obey the first and not the second, he was enunciating what is strictly true. But this is a truth very rarely applicable, and is wholly foreign to the subject which Blackstone had under consideration—namely, the nature of laws in general.

111. If, on the other hand, Blackstone intended to lay it down as a principle of general application that every one is entitled to institute for himself a comparison between the human and divine law, and that, in case of any proceeding taken against him for disobeying the human law, he may plead the divine precept in his defence, the absurdity of the principle may be demonstrated at once by attempting to apply it. If a judge were to say, 'I find so and so in an act of parliament, but in my opinion the divine precept is otherwise, and I decide according to the divine precept,' he

¹ See the *Dayabhaga* of Jimuta Vahana, chap. ii. ss. 28, 29; and *Strange's Hindoo Law*, vol. i. p. 53.

² See *Comm.* vol. i. pp. 42, 43; *Fonblanque on Equity*, p. 8 (fifth ed.).

would be certainly overruled by the court of appeal, and probably declared unfit for his office.

112. It seems to me that the fundamental error lies in treating the conflict between divine and human laws as an ordinary one, which the lawyer must be constantly prepared to meet. Nothing can be further removed from the truth. In every country which acknowledges a revelation, the general precepts of law which have emanated from a divine source have been over and over again acknowledged by the human sovereign authority. The Koran and the Shasters are expressly declared by act of parliament to be the law of the Mahomedans and Hindoos respectively in India¹. The precepts of the Bible have been applied to the institutions of daily life by Christians, to as great an extent as the difference of circumstances will admit; and there has been a tendency rather to strain than to contract the application of the rules of the Old Testament to the wants of modern society. So far from a conflict between human and divine law being an ordinary occurrence, it is very unlikely that any such conflict should arise. A sovereign body is not very likely to promulgate laws which all, or even a large majority, of its subjects would believe to be contrary to the commands of a Being of infinite power, wisdom, and goodness. It is far more probable that any supposed antagonism is the suggestion of ignorance or presumption. How a case of real antagonism is to be dealt with, should it arise (and, rare as it is, no one will assert it to be impossible), is a question as unfit to be considered in a treatise on law, as the somewhat similar question—when is a nation justified in rising in rebellion against its rulers?

113. It may, indeed, happen to an advocate or to a judge, that his own opinion of what is enforced by a divine precept is in conflict with some rule of positive law which he is called upon to support. But no one would pretend that the law was in any way affected by the private opinions of

¹ See 21 Geo. III. c. 70. s. 17.

those whose duty it is to administer it. Thus there are some Christians who believe that, for reasons founded on divine commands, the marriage tie is indissoluble. But this would not justify a judge who thus thought in refusing to pronounce a sentence of divorce in case of adultery. A large majority of those qualified to form an opinion have thought that there is no such divine prohibition and have made the law accordingly.

114. So there are to be found Mahommedans who consider that God has forbidden the taking of money for the use of money ; but the judges, with the general consent of a vast majority of Mahommedans, have long been in the habit of giving interest on loans of money to Mahommedan lenders ; and it would be preposterous for a single individual to set up his opinion against this overwhelming opposition.

115. What use the lawyer may still make of the divine law is clear enough. The judge, being obliged to decide, even when all his efforts to discover a rule of positive law have failed, or where there are rules which conflict, or where the interpretation of the rule is doubtful, may safely assume in such cases that the sovereign power, if it had declared its will in the form of a positive law, would have done so in conformity with the divine precept. And a judge who acts upon the divine precept in such cases is fully within the limits of his authority. He is doing that which a sovereign judge would undoubtedly himself do under the circumstances, that is, he is deciding the case according to that which is believed to be right and just. So much of divine law has, however, been incorporated into positive law, that even in this way the lawyer has very seldom to resort to it.

116. With regard to the moral law and the law of nature, it would be impossible so say whether or no we should enumerate either or both of these amongst the sources of law, until we had assigned to those terms some more definite meaning than is commonly done. That there are rules of conduct which are regularly observed amongst men, and

Use made
by lawyers
of divine
law.

Moral law
and law of
nature.

to a considerable degree influence judges in making their decrees, but are yet neither positive law nor the revealed commands of God, is undoubtedly true ; such, for instance, as the rules which regulate the intercourse of nations, the laws of war, and constitutional practice. There are also rules of conduct which judges constantly refer to, and act upon, which, nevertheless, are not law, though in England they have a tendency to become so : such, for example, as the rules of fair-dealing. Rules of this kind are sometimes said to belong to the moral law, and at other times to the law of nature. Speaking very generally, these two expressions seem to me to comprehend very much the same rules, but they refer them to different sources. The term 'moral law' appears to assume some innate faculty of distinguishing right from wrong. The law of nature, on the other hand, seems to refer to the disposition of man in an uncorrupted state¹. But the moment a difference of opinion arises as to what the rules are which are to be derived from either of these sources, no further attention is paid to them. There is something almost absurd in my asking *you* to accept a thing as right, because *my* moral sense tells me it is so, or because *I* think that it can be traced to nature. Bentham² has said that such expressions as moral sense and law of nature are only pretences, under which powerful men have concealed from themselves and others the exercise of arbitrary power, by making a sham appeal to some external standard, when they are really consulting only their own wishes. This may be true of potentates. But though a lawyer might also choose to avail himself of these or similar expressions, he would really be driven, in every case, to support himself by an appeal to an external standard, and one of a very different sort, namely the common experience of mankind. And where conduct is

¹ I am not sure that persons who refer the existence of rules of conduct to utility or expediency, might not use the term 'moral law' to describe them. But the term generally implies the existence of an innate faculty.

² Fragment on Government, chap. ii. sect. 14 ; vol. i. p. 8 of Collected Works.

to be considered, or where the rule of law is obscure or deficient, that which mankind at large has regarded as right is a guide it would be presumptuous to neglect, whatever may be the influence which has led us in that direction—our moral faculties, or our uncorrupted nature.

117. The history of these expressions exemplifies this in a very remarkable manner. The general idea of a law of nature is said to be due to the Greek philosophers of the Stoic school. 'According to nature' expressed their idea of moral as well as material perfection¹. But by what test did they discover what was and what was not according to nature? Simply by that of uniformity. What was the same to all and amongst all they accepted as natural; whatever varied they rejected². So too the Roman lawyers, before they had learnt the Greek philosophy, had, as is well known, adopted as the result of intercourse with other nations a body of law which, under the name of *jus gentium*, or law common to all nations, they very extensively applied³. When they adopted the notion of a law of nature, they did not abandon these rules, or change them a single whit. There was no necessity to do so; for the law of nature is only (as has been said) the law common to all nations seen in the light of a peculiar theory⁴.

118. So too the very expression 'moral law' shews unmistakeably, that consciously or unconsciously the rules of conduct comprised under it have been formed by habit. The word *mos*, from signifying what is customary, has come to signify what is right. It was to explain the phenomenon of a common agreement upon this point, that an innate faculty was suggested: and whenever this faculty is called in question, it is only by pointing to this agreement that its existence can be proved, or its extent measured.

119. Nor, I may observe, would it make any difference, Principle of utility.

¹ Maine's Ancient Law, p. 54 (first ed.).

² Grote's Plato, vol. iii. p. 510, n.

³ Danz, Lehrbuch d. Gesch. d. röm. Rechts, § 46.

⁴ Maine's Ancient Law, p. 50 (first ed.).

so far as regards the matter now under consideration, were we to drop these terms altogether, and substitute the principle of utility in their place, as those would have us do who have most strongly attacked them. For however useful it may be, politically speaking, to establish clearly in men's minds that the greatest happiness of all is the true guide of action, the test of conformity to this principle can be no other than public opinion¹. A reference to utility, separated from experience and resting on a bare assertion of the good or evil tendency of a particular line of conduct, is just as powerless to convince, and just as apt to serve as a disguise of arbitrary power, as an appeal to either nature or a moral sense. In whatever dress, therefore, we may choose to put our sentiments, I do not think the lawyer need go beyond actual experience.

120. There are, however, two countries of Europe in which the rules of conduct we have just been considering have played a different and more conspicuous part. I have already alluded to the effect of equity on Roman law, and the equity of the English Chancellors is not wholly dissimilar, and its effects have not been less important. For a full and clear exposition of the method by which upon an assumed principle of natural equality, or equity, the Roman lawyers managed to get rid of dogmas and distinctions which belonged to the strict law of Rome, but which were not found in the law common to all nations, I must refer the student to the chapter on 'Equity' in Sir Henry Maine's *Ancient Law*. Our own notion of equity is so far identical with this, that the moral law comes in as an avowed remedy for the inconvenience and inapplicability of an already existing system.

¹ Bentham admits this. He says: 'Those who desire to see any check whatsoever to the power of the government under which they live, or any limit to their sufferings under it, must look for such check and limit to the source of the Public Opinion Tribunal, irregular though it be, and, to the degree in which it has been seen, fictitious: to this place of refuge, or to none; for no other has the nature of things afforded. To this tribunal they must on every occasion appeal.' *Securities against Misrule adapted to a Mahomedan State*, sect. 1; vol. viii. p. 562 of *Collected Works*.

But the origin of English equity is in that early stage of history when the idea of law was very incomplete, and the exercise of the judicial function had not been clearly separated from the ordinary exercise of sovereign authority. The decrees of the Court of Chancery were in their origin founded on a sort of remedial power residing in the sovereign by virtue of the prerogative. It was the King's conscience which was moved by an injustice; and because it was one which was not remediable by the ordinary law, the Chancellor received a commission to remedy it, sometimes from the King himself, but sometimes also from Parliament¹. Of course it was easy to pass from this to a general commission to redress grievances for which the strict rules of law supplied no adequate remedy, without noticing that thereby power was given to the Court of Chancery practically to fix the limits of its own jurisdiction, by determining in what cases the deficiencies of the common law rendered it necessary for itself to interfere.

121. Notwithstanding this, equity has to a great extent lost in England that feature, which at first sight it would seem easiest to preserve, namely, its elasticity. Sir Henry Maine² considers that this is due to courts of equity having originally adopted certain moral principles, which have been carried out to all their legitimate consequences, and which fall short of the corresponding ethical notions of the present day. I venture to think that it is also due, in part at least, to the very different conception of law itself by modern lawyers, and to the great importance which is now attached to the stability of law, and to the necessity, in order to secure it, for a complete separation of legislative and judicial functions. I do not, of course, canvass the acute and truthful

Why equity has become comparatively rigid.

¹ Spence's Chancery Jurisdiction, vol. i. p. 408.

² Ancient Law, p. 69 (first ed.). Notwithstanding the high authority of Maine on such a point as this, I doubt if equity has become so inelastic as he supposes. I rather think it has taken a fresh start lately; and that the closer relations of courts of law and equity may have had something to do with a relaxation in the stiffness of both.

generalization that equity precedes legislation in the order of legal ideas, but I would base it on a far more general principle than the preliminary assumption of fixed ethical rules.

122. Consider the matter from the opposite point of view. Equity precedes legislation in legal history. Why? Because the idea of law as an inflexible rule without the possibility of modification is wholly unsuited to the early notions of the functions of courts of justice. According to a notion which extends far down into our own history, the function of judges is not only to enforce the commands of a sovereign, but under his authority to redress grievances. But it is only when there is a separation of judicial and legislative functions that it becomes possible to distinguish the province of law from the province of morality. Both ideas are comprehended under the term 'justice.' When this separation has taken place, then the flexibility and adaptability to special circumstances, which are the very essence of the remedial functions of courts of equity, conflict with the idea that the rules to be administered are rules of law, and with the conception of law which now prevails in jurisprudence.

123. Inasmuch however as the rules of equity have a tendency under the influence of precedent to become rigid, their elasticity depends on the same causes which give elasticity to the common law:—that they are made by judges in the course of judicial decision; that they are *ex post facto* and concrete; and that they are not, like an act of parliament, prospective and abstract¹.

In India. 124. A very curious problem with reference to equity is being worked out in India. We scorn the exclusive maxims of the Roman Law, and we emphatically profess to extend the protection of law to all classes of the Queen's subjects alike. Nevertheless, there are in India enormous gaps in the law. It is not too much to say that there are considerable classes of persons whose legal rights are, with reference to many topics, very imperfectly defined: and

¹ See *supra*, sec. 98.

there are many topics affecting all classes on which it would be scarcely possible to lay down a single principle which there would not be some hope of challenging with success. It has been supposed that in India these gaps are to be filled up by the judge deciding the case according to 'equity and good conscience.' And it has even been said, that all the rules of law which a judge has to apply in India are subject to 'equity and good conscience.' But though in the present state of Indian law some such maxim and some such expedient may be necessary, it is well to be on our guard against the dangers to which it may lead. Constantly criticized by an able bar, always closely watched by a jealous public, generally dealing with suitors who have the energy and means to resent injustice, judges administering equity have been under a restraint as effective, if not as obvious, as judges administering common law. Under these restraints, and with ethical ideas generally accepted in an homogeneous society, as in England, equity may do, and no doubt has done, very useful work. But in a country like India, where these restraints are almost wholly wanting, and where it is perfectly possible (not to speak of minor antagonisms) that in successive courts of appeal a Hindoo, a Mahomedan, and a Christian might have to sit as judges in the same case, the attempt to apply a system which is assumed to be ethical, and which has only been extensively applied in two countries of the world, might seem somewhat hazardous¹.

¹ The difficulty of transferring the ideas of European systems of law, together with all their traditional modifications, into Indian courts, is illustrated by a line of argument which I have more than once heard. It is said (and truly said in a certain sense), that all courts of law in India are courts of equity also, and that the law must therefore be administered equitably. And (it is urged) it would be inequitable to apply strictly the rules of procedure, where they would press hardly on particular litigants. No one would think of claiming any special favour on such a ground in the English Court of Chancery. But it is not so easy to explain to a person wholly ignorant of the history of the terms, why, with the principles which they profess to adopt, courts of equity do not more frequently than any other courts relax the rules which they have once laid down.

CHAPTER III.

PERSONS AND THINGS.

Things
real and
imagi-
nary.

125. The terms 'persons' and 'things' occur very frequently in law, and it is necessary to try and get some idea of what we mean by them. I will first deal with the term 'thing.' In its narrowest and strictest sense a thing is a permanent sensible object other than a person. But it is sometimes used to denote any object real or imaginary about which we can speak or think. To its use in this extended sense there can be no objection provided it be understood that we cannot give physical attributes to imaginary objects.

Things
corporeal
and incor-
poreal.

126. Objects which are sensible are what we call corporeal, as land, gold, corn, and so forth. But if we include amongst things those objects which we can conceive, we have two classes of things, corporeal and incorporeal.

127. Rights are incorporeal things: and the law deals with them as such. Thus a debt or a patent may be pledged, sold, and transferred either inter vivos or by will. In other words, a right may be itself the object of rights.

128. Whilst a right is itself necessarily incorporeal, the object of the right may be either corporeal or incorporeal. Thus if *A* owe a debt to *B*, the object of *B*'s right is money and is corporeal; but the debt itself treated as the object of pledge, or sale, or bequest, is incorporeal.

129. Things are divided into moveable and immoveable; and this division corresponds to an obvious physical distinction. This division of things is not much in use in England. English lawyers prefer to divide things into real and personal. A learned modern author suggests that the terms 'real' and 'personal' were not in use prior to the seventeenth century¹. But I find them used, apparently as familiar expressions, in the reign of Henry the Seventh². It is not unlikely that the terms 'real' and 'personal' are connected with the division of actions in the Roman law into actions in rem and actions in personam. The actio in rem of the Roman law was founded on what was called a jus in rem; the actio in personam upon a jus in personam. I shall explain the terms 'in rem' and 'in personam' more fully hereafter. It is sufficient to say now that a jus in rem is a right of ownership, or a right available like ownership against persons generally; whilst a jus in personam is a right available against an individual or against determinate individuals. Now English lawyers also divided actions into real and personal, and the real action, like the actio in rem, was based upon a jus in rem, whilst the personal action, like the actio in personam, was based upon a jus in personam. But in the English law there was a further distinction between real and personal actions, a distinction of which the Roman law knew nothing. In a real action the very thing itself could be recovered in specie, and the judgment could not be otherwise satisfied. In a personal action the judgment could always be satisfied by the payment of a sum of money. But further (and this is the point of connexion we are seeking for) a real action could only be brought in respect of immoveables, and hence immoveables got the name of realty. Moveables, on the other hand, were always sued for in a personal action, and got the name of personalty³.

Things
moveable
and im-
moveable.

Things
real and
personal.

¹ Williams on Real Property, p. 7 and note.

² Year Book, 6 Hen. VII, fo. 9.

³ Bracton says: 'nunc cum sit res mobilis quae petatur, sicut leo, bos

130. In a general way, therefore, real things, in the English law, were things which could be recovered in a real action; in other words, land and rights over land; and all things which could not be so recovered were considered as personal: if there were any things the nature of which was doubtful they were set aside as mixed; and for some purposes of procedure this rough classification was sufficient. But the classification of things into real and personal had to be applied to a purpose for which greater accuracy was requisite. Real things at a man's death go to his heir, and personal things to his executor or administrator. Everything in its turn, therefore, has had to be marked as real or personal; and the courts in making this notation, though professing generally to adhere to the old line of distinction, have made some considerable departures from it. For example, certain things affixed to the land, such as machinery and the like, are, nevertheless, sometimes treated as personal. Shares in a railway or canal company are also considered as personal. So is rent actually due. But the right to receive future rent is real. Leases for lives are sometimes real and sometimes personal. Partner-

vel asinus, vestimentum, vel aliud quod consistit in pondere vel mensura, videtur, primâ facie, quod actio vel placitum esse debeat tam in rem quam in personam, eo quod certa res petitur, et quod possidens tenetur restituere rem petitam. Sed revera erit in personam tantum, quia ille a quo res petitur, non tenetur precise ad rem restituendam, sed sub disjunctione, vel ad rem, vel ad precium, et solvendo tantum precium liberatur, sive res appareat, sive non. Et ideo si quis rem mobilem vindicaverit ex quacunque causa ablatam, vel commodatam, debet in actione sua definire precium et sic proponere actionem suam. . . . Et unde quia non compellitur precise ad rem quae petitur, erit actio in ipsam personam, cum implacitatus per solutionem tantundem possit liberari. (Book III. chap. i. fol. 102 b, vol. ii. p. 134 of Twiss's edition.) Bracton here expresses, in the language of the Roman Law, a distinction which was quite unknown in that system. The *actio in rem* was applicable to both moveables and immoveables, and down to a very late period neither one nor the other could be recovered in specie. Afterwards, under the legislation of Justinian, specific restitution could be ordered in any action and in respect of any kind of property. The distinction between the remedies for the recovery of real and personal property is of German origin. See Gaius iv, 1, 2; Beseler, Syst. d. Gem. Deutsch. Privat R. § 86; Holtzendorff's Encycl. Syst. Th. pp. 526, 547, 554.

ship property of every kind is personal. And land itself, as soon as it is agreed to be sold, becomes personal; whilst money agreed to be laid out in land becomes real. Now therefore that the distinction between the various kinds of actions is abolished it would be difficult to say more than that real things are those which go to a man's heir, and personal things are those which go to his executor or administrator.

131. Persons are human beings capable of rights. To Persons. constitute a human being capable of rights two things are necessary, birth and survival of birth.

132. There are expressions to be found in English law- What constitutes birth. books which look as if the foetus, or even the embryo, in the mother's womb were capable of rights¹. Thus we find it said that the unborn child may take by devise or inheritance. But I think the true meaning of this is, not that the unborn child really takes, but that the right is reserved for the child until the moment of its birth. This appears also to be the view of the best German jurists². The framers of the Prussian code state, no doubt, that certain rights, e.g. to be protected from violence, belong to the unborn child³; and there is, undoubtedly, a duty generally recognised to abstain from injuring the unborn child, quite distinct from the duty to abstain from injuring the mother; a duty which is imposed upon the mother herself. But this may be a duty to which there is no corresponding right, and therefore there is no necessity on this account to attribute any right to the infant. The French code uses expressions which are ambiguous⁴. But the maxim always relied on by French jurists is 'qui in utero est pro jam nato habetur⁵.' This is a fiction, and such a fiction is only necessary on the assumption that birth

¹ Blackstone's Comm. i. 130.

² Unger, Syst. d. österr. allgem. Land-R. vol. i. p. 232; Windscheid, Lehrb. d. Pandekten-R. s. 52; Vangerow, Lehrb. d. Pandekten, § 32. See Dig. i. 5. 7; 50. 16. 129.

³ Land-R. i. 1. 12; Dernburg, Lehrb. d. Preuss. Pr. Rechts, vol. i. p. 83.

⁴ Code Civ. art. 725, 906.

⁵ Pothier, Œuvres, ed. Bugnet, tom. viii. p. 7; tom. i. p. 484.

is a necessary condition of personality. On the other hand, if we take the view that an embryo from the moment of conception is a person, we must then, if it should never be born, get rid of it by the contradictory assumption that it never existed.

133. What constitutes birth has been very carefully considered by English lawyers in reference to the very common charge of child-murder. If the child has not been born the charge of murder cannot be sustained. The question, therefore, what constitutes birth is in these cases a very important one. The main circumstance which constitutes birth, so as to render a charge of murder sustainable, is complete separation from the mother¹. Nothing is said about maturity, but the use of the word 'child' seems to assume that the foetus must have assumed the human shape. The child must also be born alive. There is no other express requirement. The French law requires that the child should be, what is called, *viable*². This expression is vague. It seems to indicate that the foetus should have advanced to that stage in which it possesses all the organs necessary to continuous life, and should be in other respects capable of living. But there is always great difficulty in getting an exact account of the condition of a child dying immediately after its birth, and not very carefully examined by any skilled person³. An attempt has been made to meet this difficulty by a rule that every child born prior to the hundred and eighty-second day after conception, should be presumed incapable of living, and, therefore, of becoming a person. The Roman law does not (as has been supposed) countenance any such presumption; and it is open to the very strong objection that it necessitates for its application a determination of the date of conception with an accuracy which is very

¹ Steph. Dig. Crim. Law, art. 218. The division of the navel string is not necessary.

² Code Civ. art. 725, 906.

³ There seems to be a presumption in favour of viability. See Sirey, Codes Annotés, notes 5, 6, and 7 to Code Civ. art. 725.

rarely attainable. The question whether there should be any requirement of vitality beyond the bare survival after the child has left the body of its mother and the acquisition of the external human shape has been much discussed by German jurists, but their opinions are based to a large extent upon the authority of the Roman law¹.

134. There has been some disposition to make it a requisition to the attainment of personality that the child should have cried, but the Code of Justinian expressly declares that this is not requisite, and modern jurists generally take the same view².

135. A human being ceases to be a person at death. The Death. determination of this event presents no difficulties of the kind we have been considering. If the body is under view there is rarely any difficulty in determining whether or no it has ceased to live. But if a man leaves his home and gives up all communication with his family and friends, so that all trace of him is lost, then it becomes very difficult to determine whether or no he is alive or dead. So also it is sometimes difficult to determine at what exact moment death has taken place, if that determination is necessary³. There are certain rules which are intended to obviate these difficulties, but these belong to the head of evidence.

136. Rights and duties are sometimes attached to an aggregate of human beings in such a way that the individuals composing the aggregate are altogether lost sight of; that

Rights and duties attached to aggregates of persons.

¹ See the subject discussed at length in Savigny, Syst. d. h. Röm. Rechts, vol. ii. Beil. 3; Vangerow, Lehrb. d. Pandekten, s. 32; and particularly Wächter, Pandekten, s. 40.

² Code, 6. 29. 3; Sav. Syst. vol. ii. p. 8.

³ There is no such thing in England now as civil death: and there is very little said about it even in our old books. It was of two kinds, that which took place on conviction for certain crimes, and that which took place on becoming a member of a monastic order. See Coke's Reports, vol. ii. p. 48; Sav. Syst. d. h. Röm. R. vol. ii. p. 151; Dernburg, Lehrb. d. Preuss. Pr. R. vol. i. p. 80; Domat, Liv. prélim. Tit. 2. sect. 2. § 12; Code Just. 1. 3. 56. 1. The effect of entering a religious order is very ably discussed by Dr. Friedrich Hellmann in a pamphlet entitled Das Gemeine Erbrecht der Religiösen; Munich, 1874.

is, the aggregate is looked upon as a single person (a fictitious one of course) to whom the rights belong and upon whom the duties are imposed. Strange as this conception appears to us when we come to reflect upon it, yet it is very common. As a familiar example of it I will take the case of the University of Oxford. The University of Oxford is an aggregate of persons consisting of the Chancellor, Masters, and Scholars. In common language the University is said to own a large amount of property, to make contracts, to buy and sell, to bring and defend actions. This language is perfectly accurate. These things are done, and, in the eye of the law, not by any individual member of the University but by the University as a whole. And the complete distinctness of the University, as a person, from the individual members which compose it, is seen by this, that if any member of the University occupies (say) a house belonging to the University, he occupies it, not as being himself owner, but as tenant or licensee of the University. So also if a member of the University were to intrude upon the property of the University he would commit a trespass. So also if I were to make a contract with the University there would be no 'vinculum juris' whatsoever between myself and the individual members of the University. The contractual relation would exist between me and the fictitious person called the University alone. The University is always present to our minds as the person to whom the rights and duties are attached¹.

Rights
attached
in early
times to
families.

137. The attribution of a capacity for rights and duties to an imaginary person is not to be looked on simply as the resource of an advanced and highly technical system of jurisprudence. The idea, though it has received considerable modern development, reaches far back into antiquity. Some

¹ See the Essay on Juristische Personen in Savigny, Syst. d. h. Röm. Rechts, vol. ii. §§ 85 sqq., which is, as usual, most instructive and interesting. The Roman lawyers generally said of such an imaginary person 'personae vice fungitur,' and as regards its rights and duties they expressed themselves thus, 'Si quid universitati debetur singulis non debetur, nec quod debet universitas singuli debent.' Dig. 3. 4. 7. 1.

of the earliest legal conceptions we meet with are those in which rights and duties are attached not to single individuals but to families. Now a family is an aggregate which in early times formed such an imaginary person as I have been describing. In early times the homestead, the cattle, and the household utensils are spoken of in law as belonging, not to the individuals who composed the family, but to the family itself. The reason of this I take to have been the simple one that the law did not advance beyond the threshold of the family residence. The rights of the family *inter se* (if it could be said that there were any) were not yet legal rights: they were disposed of, not by the law, but by the family council. It was enough, therefore, for the law to say that the rights belonged to the family *en bloc* without defining them any further. But even after the rights of the individual members of the family *inter se* began to be legally recognised, the conception of the family as the subject of legal rights and duties still remained, and was extended to artificial aggregates.

138. Continental lawyers call an imaginary person to which rights and duties are attributed a juristical person¹. A juristical person is generally an aggregate of real persons, but there is no difficulty in creating an imaginary person which does not contain any real person. Thus under the Roman law there was an interval between the death of a person and the assumption of the inheritance by his successor. During this period the Roman lawyers found it very inconvenient that there should be no one to represent the estate.

Juristical persons, how conceived by continental lawyers. Need not be aggregates of persons.

¹ Thibaut uses the expression 'Gemeinheit,' which Lord Justice Lindley translates 'corporation.' But Thibaut's original definition of a *Gemeinheit* would hardly coincide with what is called a corporation in the English law. From Lord Justice Lindley's translation it would appear that this definition was modified by the author in later editions, but I have not been able to ascertain exactly how. It would seem, however, that Thibaut was disposed to substitute for 'juristical person' the expression 'moral person.' See Thibaut, *Syst. of Pandects Law*, General Part, s. 113, transl. by Lindley. The same expression is used in the Italian Civil Code, art. 3. This is a new abuse of a term already pretty well misused.

Accordingly they made the estate itself into an imaginary person, or, as the phrase was, '*haereditas personae vice fungitur.*' So in order to have some person who could represent the claims of the public they created another imaginary person called the *fiscus* or treasury.

How they
are creat-
ed.

139. There is a natural tendency whenever we consider a group of rights and duties as connected with a particular thing to speak of them as belonging to that thing¹. For example, if property be given for the maintenance of a hospital we naturally speak of it as 'belonging to the hospital'; so if a contract is made with some three or four persons who are jointly carrying on trade we speak of it as a contract 'made with the firm.' So when a man has become insolvent we speak of the property which is divisible amongst his creditors as 'belonging to his estate.' So also we speak of rent being due from the land, of an estate being liable for a debt for which it is mortgaged, and so forth.

If the rights and duties thus spoken of were really attributed to the hospital, the firm, the estate, or the land, there would in each case be a juristical person. But if we examine these cases more closely we shall often find that there is a natural person to whom the right or duty in question really belongs, and that these expressions are only used to indicate the extent of the right or duty, and how it is transferred. Thus, when we say that an estate is liable for a debt, we do not mean that the owner of the estate is not liable, but that the liability can be enforced by seizing or selling the estate whoever may happen to be the owner, and that on the transfer of the estate this liability of the estate passes over to the transferee. If that is our meaning there is no juristical person, but only the use of a figurative expression which indicates shortly the legal situation, but does not fully or accurately describe it.

¹ This tendency is by no means confined to lawyers and to legal relations. In common language we use such expressions as 'a school gaining a distinction,' or 'a club getting into debt.'

140. All lawyers agree that juristical persons should be created to some extent. But there is a difference of opinion as to what are juristical persons, and as to what is necessary for their creation. Some persons would allow that the estate of a deceased person is a juristical person¹, but would not allow that the public treasury is so. Others again, who would admit the public treasury, would not admit the land subject to burdens. The real question seems to be that just indicated. To whom do the rights and duties belong? Is the person who in a court of law or in a legal transaction represents those rights and duties acting on his own behalf, or on behalf of some fictitious creation which acts through him? This is substantially the same question, and it is in this latter form that it is generally put by English lawyers. When an inquiry is made whether a particular thing or aggregate is a juristical person, they always consider one point only, namely, whether or no it has capacity to act. If it has capacity to act it is a juristical person, otherwise not².

Difference of opinion amongst continental lawyers.

Opinion of English lawyers.

141. Of course this capacity to act is also an ideal capacity though it produces real effects. An ideal being can never really act, but it can be represented by a real person who can act, and can create duties and obligations on behalf of the juristical person by way of representation. The act of the representative, though not so in reality, may conveniently be treated as to all its legal effects exactly as if it were the act of the juristical person; and where the ideal creation has this

Juristical persons act through their representatives.

¹ See Sav. Syst. d. h. Röm. Rechts, s. 89; Unger, System d. österr. allgem. Privat-Rechts, vol. i. p. 317; Holtzendorff, Jurist. Encyc. s. v. Stiftungen.

² The figurative language in which lawyers attribute rights and duties to things or aggregates is, of course, very important, because it may, in effect, define the rights and duties themselves. Thus when a judge says that an estate (meaning perhaps a piece of land) is liable, he may intend to assert and to define the liability of the present owner of the estate. So when, in a recent case, Sir William James, by a rather daring use of language, spoke of the estate of a deceased person as a 'co-contractor,' he both affirmed and at the same time limited the liability of the representatives. See Law Reports, Chancery Appeals, vol. ix. p. 343.

capacity of acting through a representative, English lawyers allow that it is a juristical person, or, as we call it in England, a corporation¹. And the term corporation with us implies the attribution of the capacity to act through a representative. This is so clear, that when a corporation is created the capacity to act need not be specially granted. So far as it is possible that acts should be done through a representative it will be presumed that a corporation may do those acts, provided that they are consistent with the purpose for which the corporation was created.

Corporations in England are always aggregates of persons: but a change in the members does not affect the corporation,

142. All corporations in England consist of aggregates of persons, but, as appears from what has been already said, the juristical person, the corporation, is something totally distinct from the persons who compose it: and hence it follows that no change in the persons who compose the corporation produces any change in the corporation. If one shareholder goes out of a company which is a corporation and another comes in, the corporation still remains the same corporation as before. The shareholders of the New River Company have been all changed over and over again since its formation, and yet the juristical person, the corporation, to whom all the rights and duties are attached, has been one and the same continuously from its creation.

even although the members manage the property of the corporation in their own interest.

143. The view that the individual members of the corporation are not the owners, not even the co-owners, of the corporate property, which is undoubtedly the true view, is sometimes obscured by the circumstance that the members of the corporation have in their own hands the management of the property of the corporation, and have also a right to apply the profits of it to their own use. Thus in a municipal

¹ I am not sure that some questions may not arise on the language of Order 48 a, rr. 1, 3, and 8, of the Rules of the Supreme Court which provide that partners may sue and be sued in the name of the firm. It was, of course, not intended to make every firm a corporation, but these rules seem to give a firm capacity to act, and also to treat a firm as the owner of property, and this is going a long way towards making a firm a corporation.

corporation, or corporation of a town, the freemen, who are the persons who compose the corporation, have very often the right to regulate the common lands adjacent to the town, and to turn out their own cattle there. So too a shareholder in a railway company has a right to vote at meetings and to receive his share of the profits of the undertaking. Still the freeman has only what is called a *jus in alieno solo*, just as he might have if he were not a freeman. So the shareholder's right to his dividend is a claim by him against the company, a debt due to him from the company. If he were to help himself to his dividend out of the company's cash-box he would commit a theft.

144. A corporation can, of course, be created by act of parliament, and many corporations are so created. The Queen has also power to create corporations by letters patent under the great seal. Private persons cannot create a corporation at their own will and pleasure, but under the authority and restrictions of certain acts of parliament any number of persons, not less than seven, may by following the prescribed forms become a corporation¹. Corporations, how created in England.

145. There is a curious thing which we meet with in English law called a corporation sole. A corporation sole is always some sort of officer, generally an ecclesiastical officer. Rights and duties are frequently attached to an officer for the purposes of his office only. When an officer vacates his office these rights and duties pass to his successors; and it being convenient to distinguish the rights and duties which attach to a man *jure proprio* from those which attach to him *jure officii*, it is permissible to speak of the latter as attached, not to the man, but to his office; just as it is permissible to speak of rights and duties which pass with the land from owner to owner as attached to the land. But this language Corporations sole.

¹ It is a general rule that juristical persons cannot be created except by the express authority of the ruling power given specially or generally. This was a rule of the Roman law; Dig. Bk. xlvii. tit. 22. See the Italian Civil Code, art. 2.

is merely figurative, and there is no doubt that, as, in the one case, the rights and duties spoken of as attached to the land are really attached to the natural persons who are successively owners of the land, so, in the other case, the rights and duties spoken of as attached to the office are really attached to the natural persons who are the successive holders of the office. The term 'corporation sole' is, therefore, as it appears to me, a misnomer. The selection of persons who are styled corporations sole is a purely arbitrary one. The Queen is said to be a corporation sole, and so is a parson. But the Secretary of State for India is not so ¹, nor is an executor; though there is at least as good reason why both these persons should be treated as corporations sole as a parson. And on an examination of the position of so-called corporations sole it will be seen that they are not really juristical persons, but only natural persons peculiarly situated as regards the acquisition and incurring of rights and duties ².

¹ The Secretary of State for India not only exercises powers but incurs liabilities *virtute officii*. This is because he represents the dissolved East India Company, of which he is the universal successor. If the conception of a corporation sole (with the substitution perhaps of a less ridiculous name) could be extended to all cases where rights and duties were attached to an office it would be convenient.

² This I think is the result of what Grant says about corporations sole. See Grant on Corporations, especially p. 635.

CHAPTER IV.

DUTIES AND RIGHTS.

146. I have hitherto considered what is meant by the term 'law,' where it is to be found, and what are the persons and things to which it relates. I now proceed to consider the relations which arise out of it.

147. Every law is the direct or indirect command of the sovereign authority, addressed to persons generally, bidding them to do or not to do a particular thing or set of things; and the necessity which the persons to whom the command is addressed are under to obey that law is called a 'duty.'

148. The word 'duty' does not belong exclusively to law. Thus it is frequently said that it is our duty to revere God, or to love our parents. But in this place, when we speak of duty, we refer only to such duties as arise out of the express or tacit commands of the sovereign authority which we obey.

149. 'Right' is a term which, in its abstract sense, it is in the highest degree difficult to define. Fortunately, where the term is used to describe a particular relation or class of relations, and not as an abstract expression of all relations to which the name may be applied, it is far easier to conceive. Nor is it impossible to explain some of the ideas which the term connotes; and this is what I shall attempt to do here.

150. Every right corresponds to a duty; no right can exist unless there is a duty exactly correlative to it. On the other hand, it is not necessary that every duty should have its corresponding right. There are, in fact, many duties to

which there are no corresponding rights¹. For example, there are duties imposed upon us to abstain from cruelty to animals, to serve certain public offices when called upon, and to abstain from certain acts of immorality; but there are no rights corresponding to these duties, at least none belonging to any determinate person. If it is asserted that a right exists at all in the cases I have put, it must be meant that it belongs to society at large; but, as used by lawyers, the term 'right' indicates something which is attributed to a determinate person or body of persons.

151. Of course, as every right corresponds to a duty, and as every duty is created directly or indirectly by the sovereign authority, so rights are created directly or indirectly by the sovereign authority also. And as the term 'duty' implies that its observance is capable of being, and will be enforced by the power which creates it, so also the term 'right' implies protection from the same source.

152. A right has sometimes been described as a faculty or power of doing or not doing. A faculty or power of doing is undoubtedly the result of some rights; for instance, the right of ownership enables us to deal with our property as we like, because others are obliged to abstain from interfering with our doing so. But we can hardly, I think, identify the right with this faculty or power.

Rights and
duties are
specific.

153. It is essential to every legal duty, and therefore to every legal right, that it should be specific. This is necessary because otherwise it cannot be ascertained whether or no the command on which it rests has been obeyed. If the legislature were simply to command parents to educate their children, without saying what constituted education, such a law would not be ineffectual, but it could only become effectual because its deficiencies would be supplied by some authority other than the legislature itself. Before we can punish a man for breaking the law something more is necessary than to make education in general terms compulsory. Somebody,

¹ Austin, *Lecture xii. p. 356* (third ed.).

such as a board of education constituted for the purpose, or, in default of such a body, the tribunals which administer the law, must have power to settle all the particulars which have not been settled by the legislature—the ages at which the children are to be sent to school, the period during which they are to remain, the penalty to be incurred by their not doing so, and so forth. If the defects in the law were supplied by a board under the powers conferred upon them there would be legislation on these subjects in the ordinary sense by a competent subordinate authority. If they were supplied by the tribunals there would be legislation of an indirect kind which would be called by the name of interpretation.

154. It being moreover the essential nature of a duty that it is the result of a command, it follows that it is necessarily imposed upon some person other than the person who issues the command. No man, except by a strong figure of speech, can be said to issue commands to himself. Every legal duty, therefore, is imposed by the sovereign body on some person other than itself.

Sovereign
body has
no rights,
and is not
subject to
duties.

155. It is equally true, though it is a truth by no means so easy to grasp, that every right belongs to a person other than the sovereign body which creates it. This, like most truths which result directly from fundamental conceptions, is scarcely capable of demonstration, yet it would not, I think, have ever been brought into doubt, had it not been for a slight confusion of language, which I shall endeavour to remove.

156. Though the sovereign authority cannot confer upon itself a right against a citizen, it may impose upon a citizen a duty to do a specific thing towards itself, as, for instance, to pay a certain sum of money into the Government treasury; and this will result in a relation very closely analogous to the ordinary one of debtor and creditor. A tax, or a fine, imposed upon a subject is indeed constantly spoken of as a debt to the Crown, and is recovered by a process analogous to that by which ordinary debts are recovered.

157. But between the so-called rights of the sovereign

to a tax, or a fine, and the right of a citizen to receive a debt from a fellow-citizen, there are, as it seems to me, essential differences. The citizen holds his right to recover his debt, but can only exercise and enjoy that right at the will and pleasure of another, namely, the sovereign who conferred it upon him. The sovereign power, on the other hand, which imposed the tax or fine, is also the power which enforces it. Moreover, the right to payment of a debt, which is possessed by the citizen, is not only dependent on the will of another for its exercise and enjoyment, but it is limited by that will; and nothing but the external sovereign power can change the nature of the legal relation between debtor and creditor. Whereas, in the case of a tax or fine, although the sovereign has expressed in specific terms, and therefore for the moment limited, the duty to be performed towards itself, it follows from the nature of sovereignty that by the sovereign will the duty may be at any moment changed. And though there is no difficulty in conceiving the *duty* which would arise upon each successive command, it is impossible to conceive a *right* of so fluctuating a character;—not because a right cannot change as easily as a duty, but because we cannot conceive a right as changing at the will of its holder.

158. Looking to the habit that prevails of enforcing those duties which the sovereign body has directed to be performed towards itself by a procedure nearly similar in form to that in common use for the enforcement of duties which have to be performed by citizens towards each other, we should readily understand, that the former class of duties, as well as the latter, had come to be considered as having correlative rights. Nor, when confined to such duties as the payment of taxes or fines, would there be any objection to the extension of the term ‘right,’ by a sort of fiction, to the claims of the Crown. It is, however, with reference to political discussions that the distinction becomes of importance. Knowing the respect which men have for legal rights, and the feeling

which all men have that legal rights ought to be secure, politicians, especially the partisans of authority, constantly base the claims of the sovereign body on the simple assertion that they are rights. Nor (as in a phrase to which I have already adverted) are the partisans of liberty, when it serves their turn, reluctant to assert that the people have rights against the Government; though it is more easy to strip off from these (so-called) rights the appearance of being founded in law. If both sides were ready with the answer, that these are only rights in the sense of being sanctioned by morality, or the general usages of mankind; and that they are not rights in the sense in which we speak of rights of property and personal security; then, I think, the assertion would lose a great part of its force, and the discussion would be more easily reduced to its true ground, namely, what is expedient for the welfare of the people at large¹.

159. Austin sums up the characteristics of right, on which I have last insisted, as follows²:—‘To every legal right, therefore,’ he says, ‘there are three parties: the sovereign government of one or a number which sets the positive law, and which through the positive law confers the legal right, and imposes the relative duties: the person or persons on whom the right is conferred: the person or persons on whom the duty is imposed, or to whom the positive law is set or directed.’

¹ The proposition that a sovereign body has no rights and is not subject to duties has been denied. For the reasons stated in the text I adhere to the view which I had already expressed. As instances to the contrary are given the right of the Queen to take criminal proceedings, and the right of the subject to proceed by way of Petition of Right. That the Queen herself may be party to a proceeding is not denied, but this she may well be without the assertion of any right vested in that body which constitutes the sovereign body in Great Britain; and as to the proceedings by way of Petition of Right, they seem to me to be carefully framed so as to avoid giving even the semblance of a judgment against the Crown. If there is a judgment against any one it is against the Commissioners of the Treasury. See 23 & 24 Vict., c. 34. s. 14; Holland’s Jurisprudence, 4th ed., p. 110; 1 Kent, Comm. 297, note c. (There is some error in the reference given in Kent’s note.)

² Lect. vi. p. 291 (third ed.).

Some rights have no determinate object.

160. Rights generally exist in respect of some specific person or thing which is called the object of the right. For example, the right of the purchaser of a house to have the house delivered to him by the vendor, or the right of a master to the labour of his hired servant. But there are some rights which have no determinate object, as, for example, the right of a man to his good name. Rights which have no determinate object are rights to forbearances merely ¹.

But all belong to a determinate person or persons.

161. Every right resides in a determinate person or persons, and whenever a duty is to be performed towards or in respect of a determinate person that person is invested with a right ².

Law of persons and things.

162. Making the various combinations which are possible, we see that we may have (1) rights of persons over persons; (2) rights of persons over things; (3) duties of persons to act or forbear in respect of persons; (4) duties of persons to act or forbear in respect of things. Laws which concern, or which chiefly concern, the rights and duties of persons in respect of persons, have been sometimes classed together and called the law of persons; and laws which concern, or which chiefly concern, the rights and duties of persons in respect of things, have been likewise classed together and called the law of things.

Rights of persons and things, an erroneous classification.

163. The chief, in my opinion the only, use of a division of law into the law of persons and the law of things is as a convenient arrangement of topics in a treatise or a code. As used for this purpose I shall speak of it hereafter. But by slightly changing the terms in which this classification is expressed, Blackstone has introduced an important error, which it is desirable to notice here. He speaks not of the law of persons and of the law of things, but of rights of persons

¹ Austin, Lect. xv. p. 400.

² J. S. Mill (Essays, vol. iii. p. 228) objects to this view of a right that it compels us to say that a prisoner has a right to be imprisoned. I do not think so. When the law has a human being for its object, there is no duty to be performed for or towards that being. The human being is looked upon as *ἀνθρώπος*; or, as Heineccius puts it (Elem. Jur. i. 135), in the case of the *filius familias*, *respectu patris res habebatur*. This was the general condition of slaves. See Austin, Lect. xv. p. 398.

and of rights of things¹. Rights of persons there are undoubtedly; for all rights are such. There may be also rights *over* things, and rights *over* persons; but rights *of*, that is, belonging to, things, as opposed to rights *of*, that is, belonging to, persons, there cannot be².

164. Sometimes a right exists only as against one or more individuals, capable of being ascertained and named; sometimes it exists generally against all persons, members of the same political society as the person to whom the right belongs; or, as is commonly said, somewhat arrogantly, it exists against the world at large. Thus in the case of a contract between *A* and *B*, the right of *A* to demand performance of the contract exists against *B* only; whereas in the case of ownership, the right to hold and enjoy the property exists against persons generally. This distinction between rights is marked by the use of terms derived from the Latin: the former are called rights in personam; the latter are called rights in rem.

165. The term 'right in rem' is a very peculiar one; translated literally it would mean nothing. The use of it in conjunction with the term 'in personam' as the basis of a classification of actions in the Roman law has been explained above³, and its meaning will be further illustrated by two passages in the Digest of Justinian. In Book iv. tit. 2. sec. 9, the rule of law is referred to—that what is done under the influence of fear should not be binding: and commenting on this it is remarked, that the lawgiver speaks here generally and 'in rem,' and does not specify any particular kind of persons who cause the fear; and that therefore the rule of law applies, whoever the person may be. Again, in Book xlv. tit. 4. sec. 2, it is laid down that, in what we should call a plea of fraud, it must be specially stated whose fraud is complained of, 'and not in rem.' On

Rights in
rem and in
personam.

¹ Analysis (passim) prefixed to the earlier editions of the Commentaries.

² Of course 'persons' here include 'juristical persons.'

³ Supra, sect. 129.

the other hand, it is pointed out that, if it is shown whose fraud is complained of, it is sufficient; and it need not be said whom the fraud was intended to injure; for (says the author of the Digest) the allegation that the transaction is void, by reason of the fraud of the person named, is made 'in rem.' In all these three cases 'in rem' is used as an adverb, and I think we should express as nearly as possible its exact equivalent, if we substituted for it the English word 'generally.' In the phrase 'right in rem' it is used as an adjective, and the equivalent English expression would be a 'general right'; but a more explicit phrase is a 'right availing against the world at large': and if this, which is the true meaning of the phrase 'right in rem,' be carefully remembered, no mistake need occur. On the other hand, if we attempt to translate the phrase literally, and get it into our heads that a thing, because rights exist in respect of it, becomes a sort of juristical person, and liable to duties, we shall get into endless confusion.

166. The term 'right in personam,' on the other hand, means a right which can be asserted against a particular person, or set of persons, and no others.

167. The persons to whom a right in rem belongs may be changed to any extent within the limits allowed by the law, but the persons upon whom the duty corresponding to a right in rem is imposed cannot be changed, because all persons are under that duty. Either the persons to whom a right in personam belongs, or the persons on whom the duty corresponding to a right in personam is imposed, may be changed within the limits allowed by the law¹.

Meaning
of the term
status or
condition.

168. I will now endeavour, not without misgiving, to explain the term 'status' or 'condition,' about which much

¹ It is necessary to distinguish carefully between a right in rem and a (so-called) real right. A real right is a right over a specific thing (a *ius in re*, as will be explained hereafter). Thus a right of ownership is a real right; it is also a right in rem. But a right to personal safety is not a real right, though it is a right in rem. The other use of the term 'real,' as opposed to 'personal,' has been explained above, sect. 129.

has been written, but, as the writers themselves generally confess, without much result. I shall confine myself to the use of these words by modern English lawyers.

169. It will, I think, clear the ground if we remember that rights and duties may depend, either upon the previous assent of the parties affected by them, or they may be independent of that assent. When I say that they may depend upon the previous assent of the parties affected by them, I mean this:—that without such assent they would not come into existence; the assent of the parties is not the cause of their existence, but the *sine quâ non*.

170. So there are rights and duties which, though they depend, in the sense above stated, on the assent of the parties affected by them, will, nevertheless, when they have once come into existence, not be changed, or prolonged, or ended at the desire of the parties.

171. And again, there are other rights and duties which not only depend on the assent of the parties affected by them, but which remain dependent on that assent, in this sense—that they may, at any time, if the parties assent, be changed, prolonged, or ended.

172. Lastly, there are rights and duties which are attached to persons in common with the whole community: there are other rights and duties which are attached, not to the whole community, but to every member of certain classes of persons in the community: and there are again other rights and duties which are attached only to individuals and not to the whole community, or to any classes of it.

173. Of the rights and duties which depend upon the assent of the parties affected by them, some may depend upon the assent of an individual, others may depend upon the concurrent assent, the *consensus* as it is called, of several individuals. In the latter case they are said to depend upon contract.

174. The rights and duties which attach to the community generally might conceivably depend upon assent, but never upon contract. Those which attach to certain

classes may, or may not, depend upon contract. Those also which attach to individuals may or may not depend upon contract.

175. As an example of the rights and duties attaching to the members of the community generally, I may give the right to personal safety, and the duty to abstain from trespass. Most persons enjoy this right and are subject to this duty by reason of birth. But a person may acquire this right and become subject to this duty by his own act, when a foreigner comes to reside in this country. As an example of the rights and duties attaching to a class, and not dependent on contract, I may give the rights and duties of a soldier as such. I may observe that a soldier, though he generally gives his assent to enter the army, never makes a contract on that occasion. As an example of the rights and duties attaching to a class dependent on contract, I may give the rights and duties of a husband as such. As an example of the rights and duties attaching to an individual, not as a member of the community, or as one of a class, and dependent on contract, I may give the rights and duties of *A* who has agreed with *B* to work for him. As an example of the rights and duties attaching to an individual, not as a member of the community, or as one of a class, and not dependent on contract (an example which it is not easy to find), I may give the rights and duties of Lord Hobhouse as commissioner for settling the disputes in Epping Forest under the 41 & 42 Vict. c. 213.

176. Now when we speak of 'status' or 'condition' we always mean, I believe, some aggregate of rights and duties attached to a person, and the difficulty there is about explaining the meaning of the word 'status' or 'condition' arises from its being used sometimes for one such aggregate and sometimes for another. We may apply it to the aggregate of rights and duties which attach to a man as a member of the general community. It would be permissible to speak of the 'status' or 'condition' of a citizen.

177. But the word 'status' or 'condition' is also, and more generally, used to express the aggregate of rights and duties which are attached to a person as one of a class. Thus we may speak of the 'status' or 'condition' of a parent, a husband, a wife, or a child.

178. But I do not think that, where there is any attempt at accuracy, we use the word 'status' or 'condition' to express any aggregate of rights and duties which is capable of being changed, prolonged, or ended at the desire of the persons who are affected by them, so as to be always under their control. The rights and duties of a master or a servant in modern times, for example, are not usually described as a 'status' or 'condition.' They are what are called 'mere matters of contract¹.' On the other hand, the rights and duties of parent and child are only to a very small extent under the control of the parties, and are usually described as a 'status' or a 'condition.' The rights and duties of husband and wife are coming more and more under their own control, and, therefore, we say that they are passing from 'status' or 'condition' to contract.

179. Another mark which will serve to distinguish 'status' or 'condition,' if we use these terms in the sense above suggested, is that breaches of the duties comprised in them do not give rise to that particular kind of remedy which the law provides for breaches of contract, even when the rights violated depend upon a contract for their existence. There would in many cases be no difficulty in giving this remedy. There is no reason why a husband should not sue his wife to compel her to return to him on the contract made at the marriage. But this is never allowed. He may sue her, but

¹ Slavery is a status or condition. Perhaps a trace of status may be found in domestic servants. I may observe that although all the rights which a master has over a slave, except the right to use personal violence (and this is not essential to slavery), might be acquired by contract, the status of slavery could not be created. All the master could get would be damages for breach of contract. Herein, I think, lies the real distinction between slavery and free service, and not, as Bentham seems to think, in the perpetuity of the service. See Works, vol. i. p. 344.

in a different way. The contract, as it were, comes to an end as soon as the condition is brought into existence. Even when a husband and wife enter into what is called a deed of separation, which is a formal contract affecting extensively their mutual rights and duties, neither of them can sue the other upon the promise which it contains¹.

180. It will now be seen what is meant by the saying so often quoted that the progress of society is from status to contract. What I think is meant is, that the rights and duties which are attached to individuals as members of a class are coming gradually more and more under the control of those upon whose assent they came into existence; and that the remedy for any breach of them is more frequently now than formerly the ordinary remedy for breaches of contract. This is obviously the case with the rights and duties which attach to master and servant: and it is even beginning to show itself very strongly in the relations of husband and wife.

Duties
positive or
negative.

181. Duties are either to do an act or to forbear from doing an act. When the law obliges us to do an act the duty is called positive; when the law obliges us to forbear from doing an act, then the duty is called negative.

Relative
and absolute.

182. Duties are further divided into relative and absolute. Absolute duties are those to which there is no corresponding right belonging to any determinate person or body of persons; as, for instance, the duty to serve as a soldier, or to pay taxes. Relative duties are those to which there is a corresponding right in some person or definite body of persons; as, for instance, the duty or obligation to pay one's debts.

Primary
and secondary
or sanctioning.

183². Duties are also divided into primary, and secondary or sanctioning. Primary duties are those which exist *per se*, and independently of any other duty; secondary or sanctioning duties are those which have no independent existence,

¹ This was the law until recently. But another step in reducing marriage from status to contract has been taken in the Married Woman's Property Act of 1883.

² Austin, Lect. xlv, p. 787 (third edition).

but only exist for the sake of enforcing other duties. Thus the duty to forbear from personal injury is a primary one; but the duty to pay a man damages for the injury which I have done to his person is secondary or sanctioning. The right which corresponds to a primary relative duty is called a primary right. The right which corresponds to a secondary or sanctioning duty is called a secondary or sanctioning right.

184. The series of duties in which are comprised the original primary one and those which exist merely for the purpose of enforcing it, very often, indeed generally, extends beyond two. Thus I contract to build you a house; that is the primary duty. I omit to do so, and I am, therefore, ordered to pay damages; that is the secondary duty. I omit to pay the damages, and I am therefore ordered to go to prison; that is also called a secondary duty, though it comes third in the series. And if, as we are at liberty to do, we look upon the duty to pay damages as now the primary one, the expression is not incorrect. The terms primary and secondary will thus express the relation between any two successive terms of the series.

185. Where the duty is relative, that is, where there is a right corresponding to the duty, and where this corresponding right is a right available, not generally, but against a particular person or persons (not in rem but in personam), the duty is called an obligation¹. Obligations.

186. The secondary or sanctioning duties which enforce primary absolute duties are themselves always absolute; that is to say, there is no right to enforce such duties belonging to any determinate person or body of persons other than the sovereign body.

187. On the other hand, secondary or sanctioning absolute duties are used to enforce primary relative duties also. Thus

¹ It is I think a matter of regret that the word 'obligation' is not adopted as a technical term of English law in the sense above indicated, instead of confining it to a small class of contracts. We certainly require some general term to express the relation to each other of two persons, one of whom has a specific duty to perform in respect of the other.

the primary relative duty of a servant to his master is sometimes enforced by the provisions of the criminal law, by means of a fine or imprisonment; and as these relative duties have, generally speaking, each their relative secondary or sanctioning duty or obligation also, they are in such cases doubly enforced. Thus if a man's property be wilfully injured, there arises the absolute duty to suffer the punishment for mischief or trespass, and the relative duty or obligation to make compensation to the party injured.

188. Secondary or sanctioning absolute duties are for the most part the pains and penalties imposed by the criminal law. I shall have occasion to discuss hereafter how far they are resorted to in civil procedure.

189. Primary relative duties correspond either to primary rights in rem, or to primary rights in personam. Those which correspond to primary rights in rem are for the most part negative; that is to say, they are duties to forbear from doing anything which may interfere with those rights. Their general nature may be best seen by considering the nature of the rights to which they correspond. Thus there are the large classes of rights comprised respectively under the terms ownership, possession, personal liberty, and personal security. These are all primary rights in rem, and the corresponding duties are to forbear from acts which infringe these rights. Primary relative duties corresponding to rights in personam are chiefly those which are created by contract. The rights comprised in the relations of family, of husband and wife, of parent and child, guardian and ward, and other similar relations, are partly primary rights in rem, and partly primary rights in personam. Thus the right of a father to the custody of his child is a right in rem; the conjugal rights of a husband over his wife are rights in personam.

190. Secondary or sanctioning relative duties, which arise on the non-observance of primary ones, are for the most part penalties and forfeitures which are enforced by civil as distinguished from criminal procedure.

191. In speaking of those duties which have no independent existence, but only exist in order to enforce other duties, I have resorted to the somewhat clumsy expedient of calling them 'secondary or sanctioning,' in order to keep in view both their characteristics,—that they exist only for the sake of enforcing other duties, and that they enforce these duties by means of a sanction.

192. It is desirable to conceive clearly the nature of a sanction. A command, as Austin has pointed out¹, 'is a signification of desire, but a command is distinguished from other significations of desire, by this peculiarity—that the party to whom it is directed is liable to evil from the other in case he comply not with the desire.' And, as every law is a command, every law imports this liability to evil also, and it is this liability to evil which we call by the name of sanction. Duty is hence sometimes described as obnoxiousness to a sanction, and it is no doubt a correct description from one point of view.

¹ Lect. i, p. 91; Lect. xxii, p. 457 (third edition).

CHAPTER V.

ON THE EXPRESSION OF THE LAW.

Inade-
quacy of
the ex-
pression of
the law.

193. Were the law ideally complete, every command with its appropriate sanction would be expressed clearly and fully by the sovereign authority. But this not having been done a great deal of the time of lawyers and judges is occupied in the endeavour to arrange and interpret obscure and conflicting rules, and to make these rules wide enough to cover the cases which have arisen. We are perpetually in search of some clear and authoritative expression of the law, which expression we very rarely find.

194. This unsatisfactory condition of the law is frequently made a reproach to lawyers, and the reproach is not altogether unfounded. A good deal of law, especially in England, has been made by lawyers, and they might have done the work better. But under this reproach there generally lies the suggestion that lawyers have done the work badly because they are lawyers: and that laymen would have done it with greater success. Make up your mind what you want to say, and say it, is thought by many to be a maxim worth volumes of jurisprudence, and to be sufficient to solve all difficulties. This is a mistake. The adaptation of language to the endless variety of circumstances and the complicated situations of an advanced civilisation, is one of the most difficult tasks to which human ingenuity can be applied. And if lawyers have

not accomplished this difficult task satisfactorily, it is not because they have pursued their special studies too closely, but because they have not pursued them closely enough. The setting apart of the study of the law as a separate profession, a separation which we find in every civilised community, clearly shows that it is only persons specially educated who are likely to perform even tolerably well the task proposed. The only successful legislation has been the work of lawyers. The talk one hears about the advantages of an appeal to common sense from the refinements and intricacies of law is, when you come to examine it, nothing more than the suggestion of an appeal from knowledge to ignorance. The knowledge of lawyers may be at a low ebb. Just now in England I think it is so. But the knowledge of laymen on legal subjects is at zero. You might (as Ihering says) just as well go to a carpenter for a coat, or to a tailor for a pair of boots, as go to a layman for your law¹. If the law is bad it must be made better by skilled persons and not by unskilled.

195. It was Bentham's grand mistake, that he failed to perceive this, and it was this failure which shipwrecked many of his finest efforts. By the well-founded indignation which he felt for legal abuses he was led to try and throw the lawyers on one side. He not only thought that they were corrupt, in which opinion he may have been correct, but he thought that all their methods were mere contrivances to conceal their corruption. He dismissed all their labours in one sweeping condemnation, and determined to begin the work afresh. For fifty years at least he laboured hard to improve the law. Yet he accomplished scarcely anything. The Pannomion, or complete body of laws, which he projected, is but a skeleton, and that an incomplete one.

196. It is certainly surprising how little has yet been done

Duties are
only im-
plied not
expressed.

¹ See Geist d. Röm. Rechts, s. 37. The whole section is most instructive, showing the true functions of law and lawyers. I have paraphrased it in an article in the Law Magazine, vol. iii. p. 281, to which I ask leave generally to refer.

by any one towards expressing the legal duties which it is incumbent upon us to perform. The duties which have been most nearly expressed are those the breaches of which are called crimes. But even here the form of the expression is a definition, not of the primary duty, but of the breach of it. It is nowhere said in positive law, 'thou shalt not steal,' but whoever does such and such an act is guilty of theft; we are nowhere bidden by the sovereign authority not to kill, but whoever causes death under certain circumstances is guilty of murder, or manslaughter, or culpable homicide. The expression is in these cases not the less effectual, but I draw attention to the form of it as remarkable.

Not very
clearly
implied.

197. None of the ordinary duties of daily life are anywhere fully expressed, and most of them are not very distinctly implied. We should look in vain for any formulæ fixing accurately the mutual duties of parent and child, husband and wife, guardian and ward; for any exact statement of the acts which are forbidden as hurtful to the person, property, or reputation of others; even for any very precise rule as to the payment of debts, or the performance of contracts. It is only when a breach of these duties is complained of that any attempt is made to ascertain them with exactness; and even then the inquiry almost invariably assumes that, if the sovereign authority had expressed itself, it would, as in the case of crimes, have defined the breach of duty, and not the duty itself.

Not stated
by Black-
stone,

198. Take for instance those duties which correspond to the right of ownership, of personal liberty, and personal security. Even a writer like Blackstone, who professes to set before his readers a complete and exhaustive view of the English law, scarcely touches upon them at all. He does not, and could not wholly overlook them. He appears to consider (rightly enough) that the discussion of them would properly fall under the head of the rights to which they correspond¹. Considering that such rights would belong to a man even in a state of nature, he calls them absolute rights; and if it were

¹ Commentaries, vol. i. p. 124.

possible that a man in a state of nature could have any rights in a legal sense, there is not the least reason why they should not be so called; though of course the word 'absolute' would then mark an antithesis different from that which I have used the word to express. But what does Blackstone, after having given them this name, tell us about these rights? He plunges at once into the consideration of political liberty, of Magna Carta, Habeas Corpus, taxation, the prerogative, and the right to carry arms. Not a word about rights in any legal sense; that is, rights corresponding to duties imposed upon individuals. At one time he refers vaguely to such rights, but only with an observation that their nature will be better considered when he comes to treat of their breach. This takes us to the Third Book, which professes to treat of 'Private Wrongs,' but we find that nearly the whole book is taken up with a description of the different courts of law and procedure. Even when he professes to discuss the wrong, or violation of the right, his attention is absorbed almost entirely by distinctions between the forms of action suitable for enforcing the remedy which the party wronged has against the wrongdoer. Nearly all that Blackstone has to say anywhere besides this, even about so important a topic as ownership, relates to the transfer of it, and the various modes in which the rights comprised under that term may be apportioned. The nature and extent of the rights themselves are passed over nearly in silence¹.

¹ Though the scantiness of expression to which I here advert is a feature of general jurisprudence, and though this tendency to confound the rights which protect person and property, so far as they are the subject of civil procedure, with the forms of pleading, is observable in other systems, it has had a special influence in English law. It would not be convenient here to trace the connexion between procedure and the evolution of law, but it will suggest itself to any one who reads the account given in books on pleading, of the 'original writ,' and the 'action on the case.' See Stephen on Pleading, seventh ed., chap. i. and the note *ad finem*. With the narrow notions of courts of civil procedure on this subject in early times, we may contrast the maxim of the criminal law, that where a statute forbids the doing of a thing, and provides no special sanction, the doing of it is always indictable. Bacon's Abridgement, Indictment (E).

or other
writers.

199. Other writers have escaped the confusion into which Blackstone has fallen between the legal rights of subjects as against each other, and the (so-called) constitutional rights of subjects against the government; but no writer, whose opinion is acknowledged as authoritative in courts of law, has yet attempted to put into an express form those duties which we all acknowledge the necessity to observe, and upon which we depend for the security of person and property. No such writer has attempted to ascertain, with anything approaching to accuracy or completeness, what constitutes a wrong, or breach of such duties. Even where the sovereign authority has taken upon itself the task of promulgating its commands in a complete form, by means of a code, we find that little progress has been made in this respect. Thus the French Civil Code, while it also abstains from defining rights, is no more explicit on the subject of wrongs than Blackstone on the subject of civil injuries, to which they correspond. We are told that whoever causes damage to another by any act, is under the obligation to repair it¹. It will be observed that here also the expression is of the secondary obligation only, and it is so vague as to give us scarcely any assistance in ascertaining the primary obligation even by inference.

200. No doubt it is this absence of clear expression on the part of the sovereign authority of the duties which it desires to have performed which has caused people sometimes to forget the principle stated above, that all legal duties derive their force from the sovereign authority alone.

Expres-
sion not
necessary
to admin-
istration
of justice.

201. This neglect of the expression of the law could never have occurred were it not (as I have already explained²) that the administration of justice between man and man does not require that the laws of a country should have received any

On the subject of this note I may be allowed to refer to an article in the *Law Magazine*, vol. iii. pp. 410 sqq.

¹ Code Civil, art. 1382. I shall discuss this definition more fully hereafter.

² *Supra*, sect. 25 sqq.

full expression. All that the judge absolutely requires is authority to settle all disputes which come before him. In every civilised country the judge will settle all such disputes, whether the law is clearly and fully expressed or not; and even when it is not expressed at all. A tribunal altogether without law, though scarcely within our experience, is not a contradiction. The question, therefore, how far the precision of legal rules shall be carried, depends upon how far a greater or less precision will produce a more satisfactory administration of justice—a question which, I imagine, ultimately turns upon how far your fixed rules are likely to produce a better result than the unfettered discretion of your judges. Considering the strong dislike which is felt to constant legislative interference, and the frequent recurrence of legislative failures, we may be permitted to doubt whether Bentham did not go too far in wishing to dry up all sources of law except imperial legislation, and thus to give to that source a new and vastly increased activity. At the same time, however, it is obviously desirable that the rules of law, so far as they go, should be as short, as simple, and as intelligible as we can make them. It is possible that the law may be too precise in detail, but it is impossible that it can be too clearly expressed.

202. The law of England has grown up almost entirely outside the councils of sovereigns and the deliberations of the legislature. Most of it is to be found in the law-reports and in a few authoritative treatises. It would surprise any one not accustomed to such inquiries to find how little of the law which regulates our daily life is to be found in the statute book. This judge-made law consists of certain principles expressed for the most part in technical terms. A considerable portion of these terms, and that the most intelligible, is the common property of the western nations of Europe, and of their descendants scattered throughout the world. They have also spread into Russia, into Turkey, into India, and into Japan¹.

Very little English law in the statute book.

A considerable portion of law the common property of civilised nations.

¹ In Russia, Turkey, and Japan, recourse has generally been had to the French law, especially the Code Civil. In India the language has been

Everywhere, of course, we find local variations, but we find very few points of entirely new departure. There is scarcely a topic dealt with in this book which has not been discussed by the lawyers of every country in Europe, and upon which the views of any single writer might not be accepted everywhere if they commended themselves to our understanding. Hence we seek in the law and legal literature of other countries enlightenment as to the law of our own ; and with this aid we endeavour to arrange and to express our legal principles, and to define accurately our technical terms. This it is which, as I can conceive, elevates law into a science. No doubt a good deal of what is called the science of jurisprudence is occupied in ascertaining the meaning of words, and this has been sometimes made a reproach. The reproach seems to imply that the inquiry is one into which it is not worth while to enter. In this I cannot agree. In law, words are the instruments not only of thought but of action. They are the means by which our conduct is tested when it is challenged by human authority ; and by which we have to guide our actions when we desire to fulfil our duties as citizens.

borrowed from English sources, scarcely, I fear, to the advantage of our fellow-subjects in the East.

CHAPTER VI.

THE CREATION, EXTINCTION, AND TRANSFER OF LEGAL RELATIONS.

203. Every law affects the legal relations of those to whom it is addressed, by the creation, extinction, or transfer of rights or duties.

204. Rights and duties can be created by the sovereign authority when and how it pleases, either directly, by a command that they shall exist, or indirectly, as the pre-arranged consequences of certain sets of circumstances which we call events.

205. So too rights and duties may be extinguished directly, or their extinction may be the pre-arranged consequence of certain events.

206. Rights and duties already in existence are, in the view of the law, things, and they are within certain limits capable of being transferred from one person to another. This transfer may likewise be made either directly by a sovereign command that they shall be transferred, or indirectly as the pre-arranged consequences of certain events.

207. Rights and duties are not often created, transferred, or extinguished directly, but their creation, transfer, and extinction are generally the pre-arranged consequences of certain events; and a great part of the law is taken up in altered.

Events
upon the
happening
of which
legal rela-
tions are
altered.

Legal determination of the nature of these events.

the enumeration and description of those events. Some of these events are, indeed, so familiar, and so well ascertained, that we have only to name them. Death, for example, is one of the events upon which rights and duties are created, transferred and extinguished: and when we say that a man's rights of ownership are transferred at his death to his heir, the description of the event upon which the transfer depends is complete. But there are many cases in which the law must determine, not merely the result of the event, but, if we are to exclude uncertainty, the nature of the event itself. For example, birth is an event upon which rights and duties are created, extinguished and transferred. We are told (for example) that a contingent estate given to an unborn son becomes a vested estate upon the birth of that son, but we have still to ask—what is birth? And there is so much room for controversy about this, that it has been found necessary¹ to lay down rules on the subject, as I have already stated. There is a vast number of events which the law has more or less accurately ascertained, as, for example, fraud, contract, sale, pledge, tort.

Legal and popular description of same event.

208. The events which I have just now mentioned, except the last, are events of which all persons have, or think they have, some conception. And some of these events have been discussed and defined for other purposes than those of law. In such cases, therefore, (and they are very numerous,) we get more than one description of the same event; I mean more than one accurate description of it. We have frequently also a large number of confused popular meanings attached to the same expression.

Desirable to have only one description,

209. It would be very convenient if expressions used to describe events having legal results could have meanings attributed to them upon which all men could agree, or, at

¹ That is, practically necessary. But observe that without any such rules the courts would still have decided without hesitation whether or no the event had happened. The question would have been called one of fact and not of law (see sect. 25 sqq.); that is, the standard of determination would have been not law, but experience.

least, upon which all accurately speaking men could agree ; for then it would not be necessary to define expressions separately for the purposes of law. But since this is not the case, and since the law has to range through a variety of conceptions, moral, physical, and psychological, it is necessary, in order to obtain precision, to define beforehand the expressions used. If then our definitions are to some extent arbitrary, it is to be regretted, but cannot be avoided. An ambiguous expression is generally a worse evil than an arbitrary definition.

210. It is obviously advantageous to use a popular expression according to its popular acceptance ; and where proper attention is paid to legal phraseology this acceptance is, if possible, never departed from. If from the vagueness or obscurity which attaches to the popular expression it is necessary to attach to it a special acceptance, it is then best to attach to it that acceptance which has been attached to it by scientific men generally : and if this again is not possible, then the law must define the expression for itself. Sometimes it is better, instead of giving a new meaning to an old expression, to invent a new expression altogether¹.

and that,
if possible,
the popular one ;

if not,
then an
accurate
scientific
one ;
in the last
resort a
legal one.

211. Clearness and brevity (which is itself a condition of clearness) can only be attained by great care in the choice of legal expressions ; and above all, by consistency in their use. Far too little attention has been paid to this subject by English lawyers ; and until our legal language has been rectified, all attempts to remodel English law must be unsuccessful².

¹ The use made of Latin terms derived from the Roman lawyers, or from commentators on the Roman law, is due to the accuracy with which these terms have been explained. They have been used (as Ihering says somewhere) till they have become like polished steel. The special pronunciation sometimes used by lawyers—as, for example, when they say *record* instead of *record*—is intended to indicate that a popular word is used in a technical sense.

² I think sufficient care in the choice of expressions has not been used in the draft of the Criminal Code. I will give an example. Amongst the various adverbs used to qualify an act and to show the grounds on which it is punishable, I find the following :—unlawfully, not in good faith,

Qualifica-
tion of ex-
pressions
by the
terms
'legal,'
'construc-
tive' or
'quasi.'

212. It is not unusual to eke out legal expressions by using popular expressions in a very special sense, and then to attach to the expression the word 'legal,' or 'constructive,' or 'quasi,' to remind the hearer that the use of the expression is a special one. Thus we speak of 'legal' fraud where no one has been deceived; of 'constructive' notice, when nothing has been announced; of a quasi-contract where there has been no agreement. The poverty of language makes it difficult to dispense with these contrivances. But much care is required in resorting to them, and they are never altogether free from objection. Such an expression as 'legal fraud,' for example, is specially objectionable. To call a thing 'legal fraud' which is really innocent, is very likely to confuse the distinction between right and wrong, and to make people indifferent about incurring charges of fraud.

Acts

213. What follows in this chapter is an attempt to clear the ground by making some general observations upon that very important class of events which we call acts. Many acts, such as contracts, torts, wills, thefts, murders, and so forth, have been separately considered. But there are some general observations to be made about acts in general which will find a proper place here.

with culpable ignorance, recklessly, negligently, in a manner likely to injure, with culpable neglect, wilfully, knowingly, with intent, knowingly and with intent, knowingly and unlawfully, knowingly and corruptly, knowingly and wilfully, wilfully and corruptly, wilfully and unlawfully, wilfully and with intent, knowingly wilfully and with intent, by a wilful omission, fraudulently, fraudulently and in violation of good faith, unlawfully and for a fraudulent purpose, wilfully and with intent to defraud, falsely and deceitfully, falsely deceitfully and with intent fraudulently to obtain, from motives of lucre. If these do not represent so many different grounds of liability sufficiently distinct to enable a jury to appreciate the distinction (and this seems hardly credible), some of them are superfluous. I am inclined to think that some are also misleading, from the grounds of liability not having been first made sufficiently clear to the minds of the framers. So too it seems very objectionable that precisely opposite meanings should be attributed to the expression 'good faith' by the Indian Penal Code (sect. 52) and the English Sale of Goods Act 1893 (sect. 62). Surely some agreement as to the meaning of words might be come to amongst English-speaking legislators.

214. The first thing to be considered is what kind of event is an act. An act, as I understand it, is an event regarded as under human control. There are few (if any) events which can be said to be wholly within human control. There are, on the other hand, few events by which man is in any way affected, the results of which might not have been changed had his conduct been different. Few events, therefore, can, strictly speaking, be said to be either altogether dependent on, or altogether independent of, human control. But many events are regarded by the law as under human control, and I know of no reason why they should be so regarded except that the legal result of them depends, in some measure, upon the conduct of the party who has exercised control over them.

215. I will analyse¹ a little further the nature of an act. An act is the bodily movement which follows immediately upon a volition. What follows upon an act in connection with it are its consequences. It is necessary to remember this, although, in common language, we often use the word 'act' to express both an act and its consequences; as, for example, when we speak of an act of murder. Without a bodily movement no act can be done. A silent and motionless man can only forbear.

216. Every act is prompted by some antecedent desire which determines the will. This incentive to a determination of the will is called motive, and without it we should not act at all. It follows that in every act we contemplate some result, namely, the result of satisfying the desire. If I yawn or stretch my limbs it is to relieve the discomfort of weariness, and I contemplate this relief as the result of my act.

217. When the doer of an act adverts to a consequence of

¹ In this analysis I have closely followed Austin, Lect. xviii-xxi. His explanation seems to me the most intelligible that has been put forward. His authorities are Locke, especially the chapter on Power in the Essay on Human Understanding, Bk. II, ch. xxi., and Brown's Inquiry into the Relation of Cause and Effect, particularly Part I, sect. 1.

his act and desires it to follow, he is said to intend that consequence.

End not
attained
directly.

218. The contemplated end of every act is the satisfaction of desire, and this which is the end is also the motive. The end and the motive are only the same thing seen from two different points of view.

The end is rarely attained directly. In common language, a man rarely does an act for the mere sake of doing it. Perhaps we sometimes laugh or shout for no other reason. But generally there are some, and frequently there are many, intermediate events resulting one from another, all of which must happen before the ultimate end or purpose is attained. For example, *A* and *B* have been competitors for a prize: *A* is successful: thereupon *B*'s rage and disappointment are so great that he conceives the desire to do *A* an injury. *B*, accordingly, contrives an elaborate plot to injure *A*. *B* has no immediate satisfaction in carrying out this plot; on the contrary it causes him infinite pains and trouble which he would much rather avoid. But he expects and desires, as an ultimate consequence of his act, that *A* having been injured he will himself find pleasure in the pain suffered by *A*, and so his own pain of envy will be assuaged.

Act
always
intended.

219. An act must always be intended, although the consequences of an act may not be so. For an act is always the result of a determination of the will which sets the muscles in motion in order to produce that motion as a consequence, even if no other consequence is desired. This excludes from the category of acts the reflex motions of the muscles, and the motions of a man in his sleep.

Conse-
quences
adverted
to not
always
desired or
expected.

220. Intention, then, is the attitude of mind in which the doer of an act adverts to a consequence of the act and desires it to follow. But the doer of an act may advert to a consequence and yet not desire it: and therefore not intend it.

221. Adverting to a consequence the doer of an act may either expect it to follow or not expect it to follow.

222. Expectation that a consequence will follow, or, as it is sometimes expressed, knowledge that it is likely to follow, without any desire that it should follow, is an attitude of mind which is distinct from intention, and it is not, I venture to think, permissible to treat the two attitudes as one, as Austin does¹.

223. I shall call this second attitude of mind, in which consequences are adverted to and are expected to follow, but are not desired, knowledge.

224. These two attitudes of mind, in each of which there is advertence to consequences, have the most important effects upon the legal results of acts. There are numberless rights and duties which depend upon the existence of a particular intention or knowledge in the doer of an act, that is, upon the act being done with advertence to particular consequences, and either a desire that they should, or an expectation that they will, follow.

225. If consequences of an act are adverted to and are neither desired nor expected, then there is neither intention nor knowledge; and so far as any legal result of the act depends upon intention or knowledge it will not ensue. Nor do I think that in any case the simple attitude of advertence without expectation or desire has any bearing upon the legal result of an act. But advertence without expectation or desire, if coupled with one other circumstance, does affect the legal result. If consequences be adverted to and considered as not likely to happen upon grounds which a reasonable man would consider insufficient, then the legal result, in many cases, is affected. For example, the doer of an act who stands in this

Know-
ledge.

Effect of
intention
and know-
ledge on
legal re-
sults of
acts.

Mere ad-
vertence
without
desire or
expecta-
tion has
no effect.

¹ The framers of the Indian Penal Code, in their definition of murder, had before them, I think, either Austin's analysis, or a similar one. But they introduce 'knowledge' as a state of mind differing from intention. The objection to this term is that it may either mean 'knowledge with advertence,' or 'knowledge without advertence.' I think it must mean 'knowledge with advertence' in the Indian Penal Code. The framers of the Draft Criminal Code for England have used the word 'means' instead of 'intends.' I do not know what is gained by this. See sect. 170 of the Draft Code.

attitude of non-expectation as regards consequences, and who has arrived at this attitude in a reprehensible manner, very often becomes thereby *liable*, which means that a particular legal result is attached to the act: whereas, if the same act had been done, and the same attitude of mind had been arrived at upon reasonable grounds, he would not be liable. Thus, if I fire at a target, having first taken all proper precautions, and I nevertheless kill a passer by, I may incur no liability; but if I do the same act, having first taken only insufficient precautions, I may be guilty of manslaughter.

Rashness. **226.** When a person does an act advertent to consequences which upon insufficient grounds he does not expect to follow, he is said to be rash, and his conduct is called rashness.

Inadvertence. **227.** These are the cases of advertence. I now come to consider cases in which consequences not in any way adverted to by the doer have followed from an act. Inadvertence, however, taken by itself, like advertence without desire or expectation, does not affect the legal result of an act. But if the inadvertence is due to an absence of that care and circumspection which a man might reasonably be expected to exercise, then the legal result is very often affected. For example, if I fire off a rifle without first looking to see whether any one is in the line of fire and I kill some one, I shall be guilty of manslaughter: but if I buy a rifle of a well-known maker, and, without examining it to see if it has any defects, I fire it off, and it bursts and kills some one standing near, I shall incur no liability at all.

Heedlessness. **228.** When a person does an act without advertent to the consequences, and he has failed to do so because he has not used due care and circumspection, he is said to be heedless, and his conduct is called heedlessness.

229. Acting with intention, acting with knowledge, acting with rashness, and acting with heedlessness, are four different conditions affecting the legal result of the act done. It is obvious that in the explanation I have given of these terms there is no pretence of complete scientific accuracy. The

explanation I have given may even be open to objection on psychological grounds. But these terms are in daily use by lawyers, who by means of them describe the conditions under which legal results ensue. I have therefore endeavoured to state what I conceive to be meant by these terms. If lawyers attach any other meaning to them, or if, with the meaning I have attached to them, they express ideas which are false, let this be stated and the error rectified. But at any rate let us endeavour to understand what we ourselves mean; and when we have arrived at a meaning let us adhere to it¹.

230. If an event be adverted to, the expectation of its happening, or of its consequences happening, may vary very greatly, and it is conceivable that the legal result should be made to depend upon the strength of the expectation. So there are degrees of reprehensibility in rashness and heedlessness which we endeavour sometimes to express by the use of such words as 'gross' or 'crass.' So the Roman lawyers spoke of *culpa lata*, *culpa levis*, and *culpa levissima*, *diligentia*, and *exacta diligentia*. These terms assume the possibility of assigning so many different standards by which to measure conduct. I do not think the use of them, or the neglect of them, affects the analysis of the mental attitude of the doer of an act which I have given above.

Other conditions of mind than those described.

231. A forbearance is the determination of the will not to act: it is inaction or omission together with advertence to the act which is not done, and a determination not to do it. A forbearance, therefore, like an act is always intended. The consequences of a forbearance may be desired or not

Forbearance.

¹ If the long catalogue of adverbs extracted from the Draft Criminal Code, given in a note to sect. 211 *supra*, be referred to, it will be seen that all or very nearly all describe an attitude of the doer's mind with or without an element of reprehensibility in the way in which this attitude is arrived at. I suppose these adverbs have, or aim at having, a definite meaning. One longs to know what it is. The Indian Penal Code as originally drawn exhibited much care in the choice of these qualifying adverbs; and even in its present form it is much more precise in this respect than the Draft English Code.

desired, expected or not expected, adverted to or not adverted to, and there will accordingly be intention, knowledge, rashness, or heedlessness, under the same conditions as in the case of acts. It is not, therefore, generally necessary to distinguish forbearances from acts.

Mental
condition
without
act pro-
duces no
legal re-
sult.

232. It is, I believe, generally agreed that a mere mental condition unaccompanied by any external act is, legally speaking, nullius momenti, and produces no legal result whatever. This might well be so for the simple reason that such a mental condition would in most cases be undiscoverable. It may also perhaps be doubtful whether the mental condition is sufficiently under our control to justify legal results being based upon it.

233. There are, of course, cases in which the legal results either of an act or a forbearance are wholly independent of the mental attitude of the person who acts or forbears. In the earlier stages of law we find this to be largely the case. We find there much more attributed to the act and much less to the attitude of the doer's mind as regards the consequences. Thus in that class of acts which we call contracts we are told that in early times, 'not only are the formalities of equal importance with the promise itself, but they are, if anything, of greater importance. . . . No pledge is enforced if a single form be omitted or misplaced, but, on the other hand, if the forms can be shown to have been accurately proceeded with it is of no avail to plead that the promise was made under duress or misconception¹.' The same thing is observable in the early English law. In early times a deed was looked upon as valid and binding, not as a formal expression of intended consequences, but as an outward and visible solemn act. Only a deed made within the jurisdiction and process of the court could be relied on in an action of debt. And a deed sealed by a party's seal might be good against

¹ Maine's Ancient Law, 1st ed. p. 313. We must not, of course, forget that the act itself is always intended; and the forms preclude any doubt as to what kind of act is intended.

him even though the seal had not been affixed by him or by his directions¹.

234. Amongst the cases still existing in which the mental attitude of the doer of an act is entirely disregarded may be mentioned the offences of manslaughter under the English law and assault. But these cases are now very few. In the Indian Penal Code it would be difficult to find a single offence which is not made to depend on the way in which the consequences of the act presented themselves to the mind of the doer; and in some cases the distinction drawn between two attitudes of mind is very fine indeed: a circumstance which has vastly increased the difficulty of administering the criminal law in India². So too the courts in the present day give themselves the greatest latitude in inquiring into the circumstances under which a deed is executed, so as to ascertain the intention of the parties, and the real nature of the proceeding, and this inquiry largely modifies the construction which they put upon the deed. Indeed so much importance is attached to the mental attitude in modern law that it would almost seem as if liability could not in many cases be conceived as arising from an act unless either the consequences were adverted to, or the inadvertence were itself reprehensible.

234 a. This habit of referring everything to intention is

¹ See Pollock on Contracts, p. 151, third ed. So an accidental destruction of the seal would make the deed void; Sheph. Touch. p. 67, ed. 1780. Under Mahommedan law, if a husband uses words of divorce they are effectual whatever may have been his intention; Baillie's Digest of Mahommedan Law, p. 208. Some of the rules relating to seisin were founded on the notion that the act without any reference to its intended consequences was effectual: and this conception of a deed as something which in itself produces a legal result apart from intention was, no doubt, the origin of the classification of contracts into contracts by deed and contracts by parol.

² In the Indian Penal Code as it now stands, a very fine distinction is drawn between culpable homicide, which is not a capital offence, and murder. If the accused knows that the act is likely to cause death, he is only guilty of culpable homicide. But if he knows that the act is so imminently dangerous that it must in all probability cause death, he is guilty of murder. See sections 299, 300. The original framers of the Code attempted no such distinction.

shown by that very large class of modern cases in which the courts insist upon declaring that there is a promise, that is an intention to create a legal liability, where it is quite certain that no such promise or intention exists. Possibly this practice originated to some extent in the impediments to the administration of justice arising out of the rules as to forms of action. But notwithstanding that the form of an action is no longer material, the 'implied' contract or promise still holds its ground, though it would seem to be simpler to refer the liability directly to the facts as they really exist without resorting to a fiction ¹.

Acts in
which
legal
results are
contem-
plated.

235. There is a very important class of acts in which the legal result follows mainly, if not entirely, because that particular legal result was itself contemplated and desired as one of the consequences of the act. From the fact that legal results are in contemplation in this class of acts, Germans call them *Rechtsgeschäfte*. Frenchmen call them *actes juridiques*. English lawyers have not yet agreed upon any name for them. The terms 'juristic acts' and 'acts in the law' have been suggested. In all such acts the doer (as the phrase is) 'expresses his intention'; that is, he indicates, or is supposed to indicate, by some means or other that he desires something.

236. It is probable that before long English lawyers will follow the example of continental lawyers, not only in appropriating a name to acts of this class (and whether they are called acts in the law, or juridical acts, or juristic acts, does not seem to me very material), but also in discussing them generally. If we take the commonest examples of this class, contracts, sales, mortgages, wills, and settlements of property, we shall find that up to a certain point the principles which regulate them are very nearly the same. The

¹ Of course the implication of a contract or of an authority to make a contract is one of the ways in which judges conceal that they are legislating. But the legislature itself can discard such fictions, and it does so. In the case of a sale of necessities to an infant the Sale of Goods Act simply creates a duty to pay (sect. 2).

mode in which the intention is ascertained, the effect of fraud, misrepresentation, mistake, undue influence, and agency, are, or at any rate might be, and ought to be, much the same in all. Brevity and simplicity, therefore, is attained by discussing these principles once for all, and this I have endeavoured to do to some extent, though in the present condition of English law it is not possible to carry the discussion very far.

237. A man's mental condition at any given moment, and his conduct in arriving at that condition, are facts, and, like any other facts, if disputed, they must be proved. There is a special set of rules which the law has prescribed for the conduct of an inquiry into the existence of disputed facts, and amongst them there are special rules which are applicable to the inquiry into the particular facts of a man's mental condition at the time when he does an act and into his conduct in arriving at that condition. These rules fall under the head of evidence.

238. Whatever may be thought of the wisdom of judges in early times in disregarding to the extent they did the attitude of the doer of an act as regards the consequences of it, there can be no doubt that the difficulty which they apprehended in ascertaining this condition was not an imaginary one. The mental condition of a person at any time is, unless he chooses to inform us of it, a matter which it is very difficult to ascertain. The inquiry into the conduct by which he arrived at that condition is no less difficult. Yet it is into inquiries of this kind that modern judges, and even modern juries, are daily called upon to enter. There may in some cases be evidence, of the usual kind, of motives which are likely to lead to the absence or presence of the intention imputed. Means of knowledge may also exist from which knowledge may be inferred, and other circumstances may indicate advertence. It is also probable that an ordinary man adverts to and expects the ordinary consequences of his acts. And there are standards of conduct supplied by experience by which heedlessness and

Mental condition, how ascertained.

Rules for ascertaining.

rashness may be determined. But it cannot be denied that we generally arrive at a conclusion as to a man's attitude with regard to the consequences of his act by a very rough method. We compare the conduct of the person doing an act with that of an average man, and by this comparison we determine whether or no he was acting intentionally, or heedlessly, or rashly. Thus if a man uses language which, under ordinary circumstances would mean one thing, whilst the speaker protests that he has used it to express another, very little attention would be paid to this protest¹. We are compelled, when we wish to determine what was intended by the words used, to consider how a man of ordinary intelligence would understand them. So if a man rides over another in the street, it is determined whether he is rash or heedless by considering whether he has acted as an average man ought to act. Such cases might seem to suggest that the reference of the legal result of an act to the mental attitude of the doer of it in relation to the consequences is but a pretence after all. This however would be an erroneous conclusion. If an act produced a legal result merely because a particular person did it, and not at all because of the mental attitude of that person as regards the consequences when he did it, then the existence of circumstances affecting that attitude would have no effect. But, to take the examples I have just put, we do not, because of the language used by him, impute intention to an insane person, nor do we treat an insane person as rash or heedless because his conduct differs from the ordinary standard of carefulness.

239. Perhaps as strong a case as any which could be put is the following. Suppose *A* to have made a will giving a legacy to *B*. Suppose further that *A* after having made his will declares in the presence of several persons whose credit is unimpeachable that he has altered his mind and that he

¹ This is not upon the doctrine of estoppel (a doctrine which English judges are rather fond of resorting to to get them out of all difficulties), but it is one of the rules for inferring intention.

revokes the legacy. Now a will is an event in which more than in any other case the legal result is said to depend upon that mental condition which is called the intention of the testator. The whole object is said to be to fulfil the testator's wishes. *B* will nevertheless, in the case put, take the legacy. This is because we are in the habit of arriving at a conclusion as to the existence of a testator's intention by an artificial method: by looking only at what he has written and signed in the presence of witnesses, and to nothing else, however trustworthy it may be. And every artificial method of inquiry into the truth of alleged facts, though, taken on the whole, it may serve the cause of truth in the majority of cases, always involves error in a minority, and the case I have put is one of the minority. But though we make use of this artificial method, the legal result is not independent of the intention. We refer to the surrounding circumstances to explain the directions of the will: we ask what were the motives which induced it: we inquire into the state of the testator's mind: and the legal result may be modified by these inquiries. If the legal result of the act were independent of the intention these inquiries would be altogether fruitless.

240. It is the same with what are called rules of construction; by which I mean those rules which have been laid down for determining what inference is to be drawn as to intention from express manifestations of it. These rules, like the rules of evidence just now referred to, are artificial, and there is no doubt that it is possible, by the application of such artificial rules, to miss the real intention. It is, however, supposed that by the application of these rules the intention is in the general run of cases better ascertained than in any other way. The supposition may or may not be correct, but there is no doubt whatever that, whether the rules are efficacious or not, the legal result is still connected with the intention. Thus we constantly hear judges lamenting the result to which some established rule of construction drives them because they think that this result was not intended. But the intention which

Rules of
construc-
tion.

thus presumed is always treated as a real intention. If there has been fraud or undue influence, or the party using the expressions under consideration is insane, the result is modified accordingly. We never now go back to the view of earlier times and say that the act alone is conclusive. English judges have sometimes said, when applying these arbitrary rules of construction, and referring to the person whose intentions are in doubt, that they will consider *non quod voluit sed quod dixit*. Roman lawyers, who were less fettered by rules of construction, used to say *non quod dixit sed quod voluit*. Still the situation of all judges is the same. They can only infer the intention from the language, and in drawing that inference they must, whether they resort to rules of construction or not, be liable to err, because they must still be guided by their experience as to what ordinary persons would mean by the terms used.

Acts of
which the
object is
the inten-
tion to
produce
a legal re-
sult.

241. In the large class of cases in which the mere fact that a legal result is intended and expressed is sufficient to induce it, the connexion between the expressed intention and the legal result is so immediate and direct that we often speak as if the legal result was due to no other agency than that of the party or parties expressing the intention. This way of looking at the matter is, however, not strictly correct, and, although the inaccuracy is sometimes harmless, it has, I think, led to some confusion. It seems in some cases to have been thought that it was an easier process to arrive at liability where there was intention than where there was none; it being apparently forgotten that the affixing of liability is an independent process, to which the one preliminary requisite, and the only one, is the sovereign will. It is, probably, in consequence of some misunderstanding as to the origin of liability that we occasionally find judges making desperate efforts to base liability upon intention, when they might just as well have explained it without any reference to intention at all. For example, the struggle to explain the right to recover money paid by mistake by an imaginary intention on

the part of the receiver to repay it seems to me to be labour wholly thrown away.

242. ¹ Manifestations of intention may be either formal or informal. A formal manifestation of intention is a manifestation of intention made in accordance with certain forms which the law has prescribed as necessary for producing a legal result. Forms are useful for four reasons:—first, to make us act with deliberation; secondly, to distinguish the preparations which often precede a final determination from the final determination itself; thirdly, to facilitate proof; fourthly, to give publicity to the act. Formal and informal manifestations of intention.

243. ² Manifestations of intention may also be express or tacit. An intention is manifested expressly when it is manifested by any means which are resorted to for that purpose. It is tacitly manifested by any means which, though not resorted to for that purpose, have the effect of disclosing it. The commonest ways of manifesting an intention expressly are by speaking and writing, but any action of the muscles, such as a nod or a wink, may be used for that purpose provided only that it is understood ³. Express and tacit.

244. When we infer the existence of intention from an act or acts not done for the purpose of manifesting it, we always Surrounding circumstances.

¹ See Savigny, Syst. d. hent. Röm. Rechts, vol. 3, § 130. In early law the performance of all important acts was generally accompanied by religious solemnities. This, no doubt, was because the Divine authority was called in to sanction the proceeding, and to add the terrors of the Divine wrath to a breach of the obligation. But these religious ceremonies are singularly well adapted to serve the secular purposes stated in the text. See as to a similar function served by the formalities of the stipulatio, Maine, Anc. Law, p. 328.

² See Savigny, Syst. d. hent. Röm. Rechts, vol. 3, § 131.

³ Contracts are sometimes divided into express and implied, as in the Indian Contract Act, where a contract is said to be express if it is made in words, and implied if it is made otherwise than in words. I doubt if it is desirable to distinguish words from other significations of desire—nodding the head, for example. Moreover the word ‘implied’ is used for another purpose—to express that the legal result of intention will follow whether the intention exists or not; and it is in this sense that the Indian Contract Act speaks of the implied authority of an agent; see sect. 187 and illustration.

look at the surrounding circumstances to see what light they throw upon the action. How far we can look at the surrounding circumstances to explain acts which are done for the express purpose of manifesting intention has not, I believe, been discussed generally, but only in reference to those manifestations which we call contracts. I shall not, therefore, discuss that question here, further than to observe that the permissibility of a resort to the surrounding circumstances depends in some measure upon whether the manifestation of intention, besides being express, has also been formal.

245. I have referred to the distinction between express and tacit manifestations of intention because it is one frequently made. There seems, however, to be a disposition to attribute to it more importance than it deserves. In some things which are said upon the subject there seems to lurk a notion that an express manifestation of intention and a tacit manifestation of intention operate in different ways. I do not think that this is the case. Whether the manifestation be express or tacit, the endeavour is to decide on the existence of the intention.

Action
through
an inter-
mediary.

246. I have already said that no one can do an act without putting his own muscles into motion. But a man very often does no more than communicate motion to some inanimate object, as when he fires a gun and hits with a bullet an object at a distance. The blow struck by the bullet is in such a case considered as his act, as much as the pressure of his finger on the trigger.

Sometimes, instead of communicating motion to an inanimate object, he communicates a wish for some motion to an animal; as when he sets a dog to hunt game in a field. Here also we consider the hunting of game to be his act.

Or the wish for the motion may be communicated to a human being; as when a tradesman bids his servant deliver goods to a customer. Here also the delivery is considered as the tradesman's act.

Agency.

247. When a human being is employed to do an act he is called an agent.

248. A human being employed as an agent may be either a free person or a slave, a grown-up person or a child, a person of average intellect or one who is non compos. These and other differences in the agent may sometimes affect the legal results of an act done through the agent, but only with reference to particular consequences; and in the general observations which I am now making I shall not further consider them. Of course, however, no question can arise in English law as to the legal result of an act where the agent is a slave.

249. The general principle of agency is that the act of the agent done under the orders of another person, whom I shall in future call the principal, has the same legal results as regards the principal as if he had done the act himself.

250. So too, if one does an act avowedly as the agent of another, even without any orders of that other, and he on whose behalf the act is done accepts it as an act done on his behalf, the legal result will be the same as if the relation of principal and agent had existed all along, and the case was one of an agent acting under the principal's orders. This is the case both where the legal result follows because it is contemplated, and where it is independent of the contemplation. But in cases where an agent does an act contemplating a legal result, whether he does it avowedly as agent or not, the person may by accepting the result put himself in the position of principal.

251. It is sometimes stated in general terms that the law of agency has been derived by us from the Roman law. To some extent this may be so. Scarcely any portion of our law has wholly escaped the influence of the Roman law. But it is easy to exaggerate this influence, and I think that in the case of agency it has been exaggerated, and that the development of the law of agency has been rather impeded by a reference to principles which are not applicable. We find, it is true, in the law of agency traces of the law of master and servant, and in the law of master and servant traces of the

Law of
agency not
derived
from
Roman
law.

law of master and slave, but these traces are becoming fainter every day; and the relation of master and slave, of which the Roman law of agency seems to have been a modification, stands at every point in strong contrast with the relation of principal and agent. It lies, for example, at the root of the Roman law that the relation of master and slave is based, not, like agency, on employment, but upon ownership. A slave could acquire property, but the result was that the property belonged to his master, not because the master employed the slave to acquire the property, but because the master owned the slave. That this is so is shown by the maxim '*melior conditio nostra per servos fieri potest; deterior fieri non potest*'—a maxim that could have no meaning as applied to agency based upon employment. So too when a slave was owned by two masters it was for a long time doubtful whether, if a slave made a stipulation by the orders of one, it did not enure to the benefit of both—a doubt which could not have been so long maintained but for the stubbornness of the principle that it was the ownership and not the employment which was to be looked to. And the view ultimately recognised by Justinian, which gave the whole benefit of the stipulation to him who gave the order, was evidently considered as introducing a new principle¹. So with the very peculiar rule that a stipulation made by a slave who formed part of an *haereditas jacens* was valid if made on behalf of the estate, but was not valid if made on behalf of the future heir by name, because the slave at the time belonged to the estate and not to the future heir². On the other hand, in the *actio de peculio* and the *actio tributoria*, the slave was considered to be the principal in the transaction which gave rise to the proceeding, and not the master, though the master might indirectly incur liability. The *actio quod jussu*, by which the master was made liable

¹ Dig. 45, 3, 6; Code Just. 4, 27, 3; Inst. Just. 3, 28, 3; Puchta, Inst. § 281.

² Dig. 45, 3, 16.

for what he had expressly ordered, and the *actio de in rem verso*, by which the master was made liable for benefits actually received, depend upon a principle which approaches that of agency. And in the *actio exercitoria*, and in the *actio institoria*, the principle was approached more closely still ¹.

252. But in the matter of delict the contrast between the relation of principal and agent and that of master and slave is most striking. The master was only liable for a delict which was done by his express orders, or in his presence with his knowledge, and which he was able, but did not choose to prevent. The slave was then looked upon as a mere passive instrument in the hands of the master, like a tool or a weapon; and the act was looked upon as that of the master himself. But for any other delict done by the slave the slave was alone liable; liable, that is to say, to pay with his person. The master only became liable if he refused to give up his slave. That this refusal, and not the employment of the slave, was the true ground of the master's liability is clear from this—that if the master sold the slave, then he had nothing more to do with the matter, which now concerned the new master only, who in his turn became liable if he protected the slave. So also if the slave were set free the master ceased to be liable, and the freedman was himself proceeded against in the usual way ².

253. There has been much discussion, especially amongst ^{Messen-}German jurists, as to what is the true distinction between an agent and a mere messenger ^{gers.} ³. Some persons deny that there is any distinction, and I am also inclined to think that there

¹ The view always taken in Roman law was, not that a contract made by a representative could impose a liability on the principal as for an act of his own, but that a principal might be liable as for the act of another person. Sohm, *Institutes of Roman Law*, § 75 (p. 339 Ledlie's translation).

² The references will be found in Hunter, *Roman Law*, p. 21.

³ See Unger, *Syst. d. österr. Privat-R.* § 90, vol. 2, p. 134; Sav. *Obl. R.* § 57.

is none. It is possible, no doubt, so to narrow the functions of the person employed, and so completely to deprive him of all discretion as to make him the mere 'tool' of his employer. But from this case up to that of a general agent with the widest discretion, we advance by imperceptible degrees, and I know of no point where the line can be drawn between agents and messengers. So too the principles applicable to agents generally seem to me to be applicable to mere messengers; only the authority of a messenger is so limited, and the act by which he produces legal results affecting his employer is so simple, that it is very rare that any legal question arises about it, any more than about an inanimate intermediary. Thus it has been debated whether a postman is an agent or a mere messenger. It seems to me to be of little consequence whether he is considered as one or the other; nor does it make any difference if for the 'postman' we substitute the 'post,' and consider this inanimate object as the intermediary. In any case, however, if we consider the postman as an agent he is an agent for a very limited purpose and with a very limited authority.

Duress.

254. When I do an act under the fear of some evil with which I am threatened by some one, not in pursuance of a legal right, and I do it for the purpose of avoiding that evil, I am said to do it under duress. It is also sometimes said that I do the act against my will. To do an act against the will of the doer is, however, impossible; for an act supposes a determination of the will to do the act, and without such determination there can be no act at all. Thus, if by sheer force I put a pen into your hand and trace your name with it, this is not your act done against your will: it is not your act at all. But if I hold a pistol to your head and threaten to shoot you unless you sign, the signature is then your act, and follows on a determination of your will just as much as if you had signed under any other inducement. Having before you the choice of two things, to sign or to be shot, you choose the less disagreeable alternative.

255. An act, therefore, done under duress is as much a man's act as an act done under any other motive. And it is also quite conceivable that a person acting under duress should have the same attitude of mind as a free agent. When under duress I do an act, although I do not desire the consequences which follow, still I may know that they are likely. Thus *A* says to *B*, 'unless you fire this pistol at *C* I will kill you.' If thereupon *B* fires and kills *C*, though he does not desire *C*'s death, yet he knows that *C*'s death is likely just as well as if *A* had offered him a bribe to fire the pistol at *C* and he had done so.

256. In these cases, therefore, there is the same combination of a mental and physical element as where there is no duress, and if the normal legal result does not follow it is because, for reasons which have appeared sufficient, a different legal result has been assigned.

257. A person may, if he chooses, express an intention to do a future act with a mental resolve not to do it. It is, I believe, a universal rule to give to the words used the same legal effect as if the intention really existed. Sometimes the intention is said to be implied: sometimes the person is said to be 'estopped' from denying its existence. In any case, what really happens is that the legal result is attributed to the words used; in this case, without regard to the intention. I think, however, that it is a convenient form of dealing with such cases to presume that the expressed intention really exists.

258. Where an intention is expressed under duress it is very likely not to be the real intention; the party who uses the expression merely pretending that such is his intention. But, according to principle, the normal legal result ought to follow in all such cases. Thus, if the party under duress expresses an intention to promise, there should be a contract; if to make a testamentary disposition of his property, there should be a will; if to make a conveyance, the ownership should pass: these results being modified, if necessary, by

enabling the party charged to set up duress in answer to the claim, or to use the duress as a ground for setting aside the transaction¹.

259. How the law stands in England it is difficult to say. It is nowhere very clearly stated. Indeed we find very little about duress in our law books. It is sometimes mentioned in connexion with criminal liability, and sometimes also in connexion with contracts: but in either case only when the duress is an injury affecting life or limb. I think, however, that the normal legal result does always follow as if there had been no duress. But this legal result is counteracted, sometimes by a decree of the court setting it aside; sometimes by giving the party subjected to the duress a special defence to any claim made against him; and sometimes by other methods².

Error.

260. Another matter which is said to affect the legal result of acts, but in a way and to an extent which it is not always easy to perceive, is ignorance or mistake. Ignorance and mistake are generally classed together, and the considerations applicable to them are the same. If it were necessary to distinguish them, I should say that ignorance is not to know of facts which do exist, and mistake is to suppose facts to exist which do not. But both are covered by the word 'error,' and for the sake of brevity I shall use that word only.

261. Of course when a man acts under the influence of error he nevertheless wills to do that to which his desires lead him. Such phrases, therefore, as '*nulla voluntas errantis*'

¹ The important difference between treating a transaction as having failed in producing its normal legal result, and allowing that result to follow whilst giving the party affected the means of modifying it or getting rid of it altogether, has not been sufficiently attended to in English law. See the contradiction in the Indian Contract Act, *infra*, sect. 274 note.

² Of course the topic of undue pressure as a ground for setting aside a contract in courts of equity has been discussed very frequently: but many of the reported decisions are based to a considerable extent upon fraud and undue influence. Courts of equity in cases of this kind do not often lay down any strictly defined principles: it would greatly fetter their discretion were they to do so. The text-books on equity are not more explicit.

have no real meaning. Nor do I understand what Blackstone means when he says that in cases of error the will and the deed act separately¹.

262. If there is error, then the act which a man wills to do produces consequences other than those which he desired or expected. But in considering the effect of error upon the legal result of an act we may get rid of those cases in which the error is immaterial; that is, those cases in which there are other consequences as to which there was no error, and which are sufficient to induce the legal result. For example, a bar of metal belonging to *A* is examined by *B*, who, without asking any questions, erroneously comes to the conclusion that it is gold. He thereupon offers to purchase it, and the offer is accepted. The error is immaterial, because there is an intention to buy a specific thing which is alone sufficient to induce the legal result.

Error when wholly immaterial.

263. The law as to error has, I think, got into some confusion by not bearing in mind what is and what is not material. Thus a great deal has been made of the distinction between errors of law and errors of fact, and criminals are often told, when they set up an excuse that they did not know the law, that though they may excuse themselves by errors of fact, yet they are presumed to know the law, and *therefore* they cannot set up as an excuse an error of law. This sounds very unreasonable, and would be unreasonable if it were true. But generally speaking it is not true. The intention to break the law, that is, the contemplation of a breach of the law as one of the consequences of the act, is not, in most cases, an element in the offence. Where an intention to break the law is an element in the offence, as in theft as defined by the Indian Penal Code², ignorance of the law can be successfully pleaded.

Error in criminal cases.

¹ Comm. vol. iv. p. 27.

² There can be no 'theft' without an intention to cause either gain or loss by unlawful means. The *animus furandi* in larceny is not so strictly defined.

Imputa-
tion of
intention
or know-
ledge.

264. But in some cases, where there is, by reason of error, no intention or knowledge which would induce the legal result, the same result is arrived at by imputing to the doer of the act an intention or knowledge which had no existence. Whether or no this imputation will be made is a matter of law.

Error of
law and of
fact.

265. In determining whether or no an intention or knowledge will be imputed when by reason of error the intention or knowledge does not exist, I do not think the law pays any attention to whether the error is one of law or one of fact. The whole question of imputing intention or knowledge is a very intricate one, and depends on a variety of considerations, but not on this one. Thus in criminal cases we hardly ever impute intention or knowledge at all, the direct infliction of punishment being reserved for real and not for imaginary offences¹. In transactions between man and man we very often do impute intention, but, as I shall show hereafter, mostly by reason of the assumption that the expressed intention and the real intention actually correspond. This

¹ There is a rough attempt to sanction the imputation of intention or knowledge in criminal cases concealed under the plausible maxim 'drunkenness is no excuse for crime.' But I doubt whether the imputation is ever really made. The drunken soldier who in a fit of fury fires his rifle at his commanding officer really intends to kill him. There is, however, a formal legislative attempt to impute knowledge (not intention) in cases of drunkenness in the Indian Penal Code, sect. 87. Cases of real difficulty are such as the following:—'The prisoner was sentinel on board the *Achille* when she was paying off. The orders to him from the preceding sentinel were—to keep off all boats, unless they had officers with uniforms in them, or unless the officer on deck allowed them to approach; and he received a musket, three blank cartridges, and three balls. The boats pressed; upon which he called repeatedly to them to keep off; but one of them persisted and came close under the ship, and he then fired at a man who was in the boat and killed him. It was put to the jury to find whether the sentinel did not fire under the mistaken impression that it was his duty; and they found that he did. But a case being reserved, the judges were unanimous that it was, nevertheless, murder.' Russell on Crimes, by Greaves, fourth edition, vol. i. p. 823. But the difficulty of this case cannot be met by any talk about ignorance of law. The best lawyer would have been in the same difficulty as the sentinel: he would have been placed between two conflicting duties. See how the case is met by the Draft Criminal Code, sect. 53.

undoubtedly, in many cases, leads to the imputation of an unreal intention, but one of a very special kind. The assumption that the expressed intention and the real intention necessarily agree is justified by our experience that upon the whole this assumption is a useful one. So also intention is imputed where there is what is called 'malice in law,' because in such cases a wrong has been done which the law desires to redress. But, as I have said, in none of these cases is the distinction between errors of law and errors of fact of any importance¹.

266. If, therefore, the distinction between errors of law and errors of fact, which has been made a great deal of, is of any importance at all, it must be so in that class of cases in which the normal legal result having followed notwithstanding the error, there is an attempt made to get rid of that result by the action of the court. That this can be done in one class of cases there is no doubt. Thus if *A* pays money to *B* on account of a debt which has already been paid, believing the debt to be still due, the usual legal result of such a transaction follows, namely that the money becomes the property of *B*; but it can be recovered back by *A*. In what cases important.

267. In this same class of cases also, as the law now stands, the distinction between errors of law and errors of fact is of importance, since if the error is one of law the money cannot be recovered. Why this should be so I cannot say².

268. There is also a peculiar class of cases in which courts of chancery have endeavoured to undo what has been done under In courts of chancery.

¹ The subject of error (mistake) is very fully discussed by Sir F. Pollock in his work on Contracts, fifth ed. chap. ix. There is the customary close running between cases in which it is held that the contract is a nullity, and cases in which it is held that there is a contract which may be set aside. The argument that 'the mind of the signer did not accompany the signature,' and that the document therefore, not only may be set aside, but is a nullity, very often operates to the injury of innocent persons. See *infra* s. 621.

² I do not think any continental lawyers recognise the distinction in this case. Dalloz, Rep. s. v. Obligation, art. 5546.

the influence of error, and try to restore the parties to their former position. They deal with such cases in a very free manner, and I doubt whether it is possible to bring their action under any fixed rules. But here again, as far as I can judge by what I find in the text-books, and in the cases there referred to, the distinction between errors of law and errors of fact, though very emphatically announced, has had very little practical effect upon the decisions of the courts. The distinction is not wholly ignored, and it may have had some influence, but it is always mixed up with other considerations, which, not unfrequently, altogether outweigh it.

Not an
important
distinc-
tion.

Distinc-
tion how
explained
by Black-
stone.

Austin.

269. The distinction between errors of law and errors of fact is, therefore, probably of much less importance than is commonly supposed. There is some satisfaction in this, because the grounds upon which the distinction is made have never been clearly stated. Blackstone says that the reason of the distinction is because every man not only may know, but is bound to know the law¹. This statement is, however, obviously untrue, and even if it were true it would not explain the distinction. Austin, after rejecting Blackstone's explanation, says, 'if ignorance of law were admitted as a ground of exception, the courts would be involved in questions which it were scarcely possible to solve and which would render the administration of justice next to impossible².' Why so? Alleged errors of fact are as difficult to investigate as alleged errors of law. And neither in the Roman law nor in modern continental systems is the distinction drawn between errors of law and errors of fact with the same sharpness as in England³. According to the Roman law there were large classes of persons to whom as it was said, in rather quaint language, *permissum est jus ignorare*. Amongst these

¹ Comm. vol. iv. p. 27.

² Lect. xxv. p. 498 (third ed.).

³ See Dalloz, Rep. s. v. Obligation, art. 142 sqq.; s. v. Peines, art. 369 sqq.; Code Civil, art. 1108 sqq.; Preuss. Allgem. L. R. I. 4, 75; Unger, Syst. d. österr. Pr. R. vol. ii. pp. 33, 34; Schwarze, Strafgesetzbuch, § 9; Sav. Syst. d. h. Röm. Rechts, vol. iii. Beyl. viii.

were rustics, minores xxv annis, and persons so placed as not to have ready access to legal advice (*jurisconsulti copiam habere*). So too it was considered whether the point of law as to which there was error was a settled one, or one as to which the authorities (*auctores diversae scholae*) differed¹. The necessity for the distinction cannot, therefore, rest upon the broad ground of practical convenience stated by Austin.

270. Savigny², in his review of the Roman law as to error, And Savigny.
endeavours to bring all the rules of it under a principle which differs from those of Blackstone and Austin. He considers, or at least appears to assume, that an error either of law or fact cannot be put forward by the person labouring under the error as any ground either for changing the legal result or for getting rid of it, if the error is caused by his own negligence; and then he goes on to assume that errors of law are *prima facie* negligent. How far these assumptions are consonant with the Roman law I cannot say, but it is clear that the English law, if it imputes anything, imputes not negligence but intention.

271. A suggestion was made in a well-known case by Lord Error as to
Westbury³, that, at any rate, an error in regard to a man's private rights.
private right must be put upon the same ground as an error of fact. Savigny had already made a similar observation. 'We must distinguish (he says) between *jus ignorare* and *jus suum* or *de jure suo ignorare*⁴.' It is difficult, on account of the vagueness of these phrases, to say exactly to what they lead. I suspect that if applied to any considerable extent they would go far to break down the distinction between errors of law and errors of fact, even in the few cases in which that distinction has had any influence.

272. A question of considerable difficulty which may arise Error as to
as to the application of the distinction between errors of law applica-
tion of
law.

¹ See the references in Hunter, *Rom. Law*, p. 480.

² *Syst. d. heut. Röm. Rechts*, vol. iii. Beyl. viii.

³ *Cooper v. Phibbs*, *Law Rep.*, Eng. and Ir. App., vol. ii. pp. 149, 170.

⁴ *Syst. d. heut. Röm. Rechts*, vol. iii. Beyl. viii. p. 327, note c.

and errors of fact is this:—Suppose the case to be one in which the law is clear, but the doubt arises whether it applies to the facts, which are also clear. If in such a case an error is made in applying the law where it ought not to be applied, or in not applying it where it ought to be applied, how is such an error to be treated? As an error of law or as an error of fact? Doubts have crossed my mind whether such a case is possible; but jurists seem to be agreed that it is possible. Savigny says, not, I think, as Professor Unger seems to suppose, that the case is one of an error of fact, but that the result ought to be the same as on an error of fact¹. The question has scarcely been discussed in England; but it has been much discussed in Germany, without any decided result at present.

Infancy,
insanity,
and fraud.

273. There are other circumstances which influence the contemplated result of an act, which continental lawyers are in the habit of discussing generally, but which for English lawyers can as yet be hardly disengaged from the particular classes of transaction with which they happen to be connected. As examples I may mention insanity, infancy, misrepresentation, and fraud. I may, however, point out once for all that it is very rare indeed that, on any of these grounds, an act simply fails to produce its contemplated legal result. The matter generally requires a much more delicate adjustment than this, especially where, as is frequently the case, the interest of third persons is concerned.

Void and
voidable.

274. English writers on law generally assume that all the cases in which the legal result of an act is affected by these special circumstances may be covered by saying that the act is 'void' or 'voidable.' But these are words of very uncertain meaning. The word 'void' means, I think, devoid of the legal result contemplated². The word 'voidable' means that

¹ Syst. d. h. Röm. Rechts, vol. iii. Beyl. viii. pp. 328, 338 n; Unger, Syst. d. österr. Pr. R. vol. ii. p. 34.

² See *infra*, s. 649, and also Pollock on Contracts, fifth ed. pp. 8, 59. Sometimes acts are spoken of as if they were void of all legal result whatsoever.

the result may be made 'void' by some one. But by whom and by what process? Continental lawyers make a triple division. First they set apart those cases in which the contemplated legal result fails altogether—as for example a will of lands made by an infant. Such acts they call 'absolutely void.' In the next class they place cases in which, as regards some persons, the act fails altogether to produce its contemplated legal result, but, as regards others, the result is produced—as for example in the case of a bishop's lease exceeding the period prescribed by the law, which is good as against the bishop but not as against his successor. These acts they call 'relatively void.' Then the third class comprises those acts which produce their legal result; but this result can be set aside by the action of some person concerned—as for example a contract induced by fraud. These acts are called 'voidable.' I think there is some advantage in this triple classification, but it does not carry us far towards attaching a precise meaning to the terms employed; and in the hot contests that have taken place whether an act is void, or absolutely void,

This is not perhaps impossible, but it must be rare. The word 'void' cannot, I think, be conveniently extended further than I have extended it in the text. Nor does current legal language warrant our extending even the term 'absolutely void' beyond this. Thus the contracts of an infant are with some exceptions declared 'absolutely void' by the Infants' Relief Act, 1874, but if the infant, when of age, is sued on a contract made during minority, and he does not plead infancy, judgment will be given against him; money paid on such a contract could not be recovered back; and property delivered in accordance with it would pass to the receiver. See Pollock on Contracts, p. 63, fifth ed. See also Anson on Contracts, seventh ed. p. 111. I cannot admit that a transaction which puts a party to his plea of confession and avoidance can be called destitute of legal effect. I may observe that there appears to be some inconsistency in the Indian Contract Act. § 10 makes free consent necessary to the creation of a contract: § 14 says that consent caused by fraud, &c., is not free. Then § 19 says that an agreement when the consent has been similarly caused is a 'voidable contract.' There is a somewhat similar inconsistency in the French Code, which, after declaring that consent is necessary to a contract and that there is 'nullité de convention' if there is fraud, error, or violence in obtaining the consent, subsequently provides that the contract must be treated as existing until it is set aside by a competent court. See Co. Civ. art. 1108-1117.

or voidable, it seems to me that the disputants have frequently used the words in different senses.

Restitu-
tion.

275. It is in connexion with cases in which the contemplated legal result has taken effect, but is to be set aside, that we come across the important topic of restitution. There is a large number of cases in which the legal result contemplated will follow, but it can be set aside by a court, not however simply, but upon certain conditions. This is called restitution, the parties being restored as nearly as possible to their original condition. This is the course which justice most frequently requires, and it was the inability to order restitution that crippled the action of courts of common law in England, and relegated cases of this class to courts of chancery. But though courts of chancery have been in the daily habit of making restitution, it is remarkable that this convenient word has not yet found a place in accepted English legal terminology.

Ratifica-
tion.

276. From a consideration of the steps which may be taken to invalidate the legal result of an act we naturally pass to the subject of ratification. There has been some dispute as to what is meant by this term also. What I understand to be meant by 'ratification' is this:—After an act has been done which has had its legal result, but which legal result may by taking the proper steps be counteracted or modified, if the person who is empowered to take these steps signifies his intention not to take them, or does some act by which he loses his right to take them, he is said to ratify the act in question.

277. This, I think, is the proper meaning of the word 'ratification.' The word is, however, sometimes used by English lawyers to express something different from this¹. Thus if an agreement be made by *B* in the name of *A* without *A*'s knowledge or authority, and then *A* consents to be bound by the agreement, the legal result is the same

¹ See Pollock on Contracts, fifth ed. p. 96; Sav. Syst. d. h. Röm. Rechts, § 203, vol. iv. p. 558.

as if *A* had antecedently authorised the making of the agreement, and *A*, in such a case, is said to ratify the agreement. There are various ways of looking at this matter which I may discuss hereafter. All I have to say now is that if this be called ratification, then we give the same name to two things which are essentially different.

278. There is rather a loose Latin phrase concerning the legal result of an act which is sometimes quoted by English lawyers, but I hardly know what meaning they attach to it¹. The phrase in question runs '*quod ab initio non valet in tractu temporis non convalescit.*' The first question in endeavouring to understand the phrase is, what is meant by 'convalescence'? According to Savigny it is this:—There are cases in which an act has not any legal result, or has not the full legal result, because of some hindrance, and in which, when that hindrance is subsequently removed, the full legal result ensues. For example:—I sell a man a horse. At the moment of sale the horse is not mine, and I have no power to dispose of him. But shortly afterwards the horse becomes mine. The sale at once becomes effectual. This, according to Savigny, is convalescence; and I know of no objection to calling it so; but if this be convalescence, then the maxim I have quoted is incorrect. Cases of convalescence in this sense are perhaps rare, but, as is shown by the example I have given, they are not unknown.

279. What I think those who use the phrase negating convalescence intend, is something which is little more than a truism, though it is sometimes overlooked. An act to which the law refuses to attribute its contemplated legal result cannot by any subsequent conduct of the parties concerned be made to produce that result. Something which has been begun may be completed. Some act which has once missed its mark may be repeated effectually. But a failure must remain a failure. We are, however, apt to ignore this, and the maxim under consideration may be useful to recall

¹ Broom's Legal Maxims, p. 178; Dig. 50, 17, 29.

it. Thus in the Roman law if a man took as his wife a girl under twelve years of age, and she remained with him, she became his wife as soon as she attained that age. This has been called convalescence, on the assumption that the original invalid marriage became a valid one. But, as Savigny points out¹, the true explanation of this case is, that under Roman law no ceremony of any kind is necessary to a marriage, but only an actual cohabitation with the intention to marry. There is, therefore, an actual and complete marriage after the girl has attained the age of puberty, and what happened before is altogether immaterial. The marriage is not then completed, but begun and ended. So in the case of an infant's will of lands: his acts after age might wear the form of ratifying the will already made; but unless they were sufficient to constitute a new will then made, I imagine they would be insufficient.

Measure-
ments of
time.

280. Sometimes in consequence of arrangements made by the law, or by private individuals in transactions recognised by the law, rights or duties come into existence after a certain time has elapsed, or cease after a certain time has elapsed. Thus I may agree to sell a cargo of wheat to you and that I shall be paid for it ten days after delivery; or the law may say that the party who fails in an action may appeal to a higher court within two months after the first judgment is given. In these and the like cases we have to see whether the prescribed conditions as to time have been fulfilled; and as this question has to be determined very frequently and with great accuracy, certain rules have been laid down as to the measurement of time, which are not, in any special sense, legal rules, but the law has adopted them.

281. The measurements of time now universally used are founded partly upon certain astronomical observations, partly upon calculation, partly upon authority, and partly upon custom. There are certain divisions of time called respectively the day, the week, the month and the year, and all measure-

¹ Syst. d. h. Röm. Rechts, § 203, vol. iv. p. 555.

ments of time are made in terms of these divisions. It is these divisions, therefore, which have to be accurately measured.

282. The exact length of a day is the result of combined Day. observation and computation. It is the mean solar day, that is, it is the time in which the earth would make a revolution on its axis, if the earth moved at an equable rate in the plane of the equator. This computation cannot be made exactly by every one, but no one need go far wrong in his reckoning of days, because each computed day coincides very nearly with an actual revolution of the earth, and each actual revolution of the earth is accompanied by such conspicuous phenomena, that the days at any one place may be easily counted.

283. The day is divided into twenty-four equal parts called Hours. hours, twelve in the forenoon, and twelve in the afternoon. Noon is, therefore, the point of time which fixes the day. This point of time is also the result of observation and computation. It is ascertained by observing the point of time at which the sun reaches its greatest altitude. This of itself does not give noon, but what is called the equation of time will enable us to calculate noon from it. There is no generally visible natural phenomenon which indicates noon, but a clock indicates it with sufficient exactness.

284. Noon however, as thus calculated, is not the same at Difference of time in different longitudes. places in different degrees of longitude. Thus noon at Sydney corresponds with five minutes to two in the morning at London. The dates, therefore, at these two places will not always correspond. It is already the 2nd of January at Sydney whilst it is early in the afternoon of the 1st in London. Persons, therefore, corresponding between these two places might get into a confusion of dates if they were not careful to mention which time they go by. In ordinary business transactions, however, the difference is of less consequence, as the change of date generally takes place outside of the hours of business at both places; so that during business hours the dates are the same. The necessity of any nice calculation is

also frequently avoided by disregarding fractions of a day, as well as by limiting the day to those hours of it during which it is usual to transact business. Thus if *A* were bound to pay a sum of money to *B* three days after notice, and notice were given to *A* at 10 o'clock in the morning of the 3rd, it would not be necessary for *A* to make payment by 10 o'clock of the morning of the 6th. He could make the payment at any time during business hours on the 6th.

285. Probably where a thing had to be done at a certain time and at a certain place, all measurements of time would be made to accord with those in use at the place where the thing was to be done.

Days how
reckoned.

286. When rights or duties are made conditional upon the lapse of a certain period of time after a certain event, a discussion has sometimes arisen whether, in reckoning the period, the day on which the event happens should be included. The general rule now is that this day is excluded¹.

Lunar and
calendar
month.

287. The word 'month' means either a lunar or calendar month. A lunar month is twenty-eight days. The lunar month is a period suggested by the moon's revolution round the earth, exhibiting the phenomenon which we call a change of moon. The true period of a revolution is nearly $29\frac{1}{2}$ days: and at first every new moon brought in a new month². But when the calendar month was introduced, the lunar month was reduced to an arbitrary period of 28 days.

Julian
year.

288. The calendar month is the result of an attempt to make the lunar periods correspond with the solar year without resorting to fractions of a day. In Rome, before the time of Julius Cæsar, the twelve lunar months, which make 354 days

¹ See Rules of the Supreme Court 1883, Order LXIV, no. 972. The Roman law seems to have been otherwise. See Arndt's *Pandekten*, § 89; Unger, *Syst. d. österr. Allgem. Land-R.* vol. ii. p. 295.

² With us, the term 'new moon' indicates the change which takes place when the visible portion of the moon passes through the vanishing point and begins again to increase. But the new moon is sometimes reckoned from the time when it becomes full. It is so reckoned in many parts of India.

only, were brought up to the solar year by the occasional intercalation of days at irregular intervals. But either from the corruption of the officers whose duty it was to see to this intercalation, or from their ignorance, the calendar got into great confusion, and accordingly Julius Cæsar rearranged the calendar, making March the first month and February the last, and varying the number of days in each month so as to give 365 days in each year, except every fourth year, which contains 366. This brought the civil year very nearly into exact correspondence with the solar year, but not quite; and by the year 1752 the error had amounted to twelve days; so that the 2nd of September in the year 1752 ought to have been the 14th. Accordingly, by the 24 Geo. II. c. 23 it was directed that the intervening days—i. e. from the 3rd to the 13th inclusive—should be omitted, and the 2nd of September was followed immediately by the 14th; and further, in order to preserve the true reckoning it was ordered that none of the hundredth years (1800, 1900, and so on) should in future be leap years, except every fourth hundredth year (2000, 2400, and so on).

Alterations made in 1752.

289. At the same time another important alteration was made. Prior to the act of George II there were two dates for the beginning of the year; one used by lawyers and the other by historians. The lawyers began the year on the 25th of March, whilst the historians began it on the 1st of January. In order, therefore, to fix any date in a given year between the 1st of January and the 25th of March, it was necessary to know which year was spoken of. For instance, January 7, 1658, of the lawyers corresponded to January 7, 1659, of the historians: and to prevent mistakes this date was very often written 165 $\frac{8}{3}$. By the act of George II it was directed that the 1st of January then next following should be the 1st of January, 1752, for all purposes, and all future reckoning should be made accordingly. This is a very important matter for lawyers to recollect when dealing with dates more than a hundred years old, otherwise they will frequently meet with imaginary inconsistencies.

‘Month’
now means
calendar
month.

290. The ambiguous word ‘month’ was formally understood to mean the lunar month of 28 days, unless it was expressly stated that a calendar month was intended. But the rule is now reversed. The word ‘month’ now presumably means a calendar month¹. This, it is true, is an irregular period, varying according as the months which it includes are longer or shorter. Thus a calendar month reckoned from the 21st of January expires on the 21st of February, and contains 31 days. A calendar month reckoned from the 21st of February expires on the 21st of March and contains 28 days only, or 29 if it is in leap year. And a calendar month from the 31st of January cannot be reckoned so as to expire on the corresponding date of the following month, because no such date exists. It is, therefore, usual to make it expire on the last day of February, that is, on the 28th or 29th according to circumstances; so the second calendar month from the 31st of January would expire on the 31st of March, the third on the 30th of April, and so on. This seems rather an arbitrary method of computation, but it has the advantage that the period can be instantaneously calculated.

¹ Rules of the Supreme Court, Order LXIV, no. 961.

CHAPTER VII.

THE ARRANGEMENT OF THE LAW.

291. Whenever people have attempted to write systematically about law, certain divisions of it have been adopted, ^{Divisions of law.} not always identical, but running mostly on the same lines.

292. The best-known and most widely accepted of these ^{Public and private.} divisions of law is that which separates law into public and private.

293. There has been much said about this division which ^{Not a scientific division,} seems to proceed upon the assumption that the division is a scientific one, based upon some principle which can be accurately stated and applied. Austin has, I think, clearly shown that there is no such principle, and that the division is not of that character¹. It is only a convenient method of arranging the topics of law for the purpose of discussion. This is how it is put forward in the place where it originally appeared, namely in the Institutes of Justinian : ‘ Jus publicum est quod ad statum rei Romanæ spectat, jus privatum quod, ad singulorum utilitatem pertinet².’ All that I understand to be meant by the passage is this :—Public law is that portion of law in which our attention is mainly directed to the state ; private law is that in which it is mainly directed to the individual. I do not think it means that these topics are capable of exact separation ; but that our attitude changes in

¹ Lect. xliv. p. 770.

² Inst. I. i. 4.

regard to them. And, according as we assume the one attitude or the other, we call law public or private.

but
depends
upon con-
venience.

294. The fact that this classification has been used for more than a thousand years testifies to its convenience: and if it is unscientific, this, though it is a fact which it is desirable to remember, does not render it incumbent upon us to discard the division. I may also observe, that though the principle of the division may not be more accurate than I have stated, there has been very little practical difference of opinion as to what branches of law should be placed in each department; and such differences as have existed have been by no means important.

How
explained.

295. If the view that I take of the distinction is correct, it would obviously be a waste of time to discuss at any length the various attempts that have been made to explain accurately the distinction between public and private law. I will, however, notice one of those attempts, being that which has been most generally accepted as successful. It is said that public law comprises that body of law in which the people at large, or, as it is sometimes put, the sovereign, or the state as representing the people, is interested; whilst private law comprises that body of law in which individuals are interested. This is a forcible, and sometimes a useful way of putting the distinction. But it is still not accurate. For though the interest of the public is in public law conspicuous or predominant, there is hardly any law in which the interest of individuals is not also concerned. And so also in private law. The interest of the public may be in the background, but it is almost always there. Thus the criminal law of theft *ad statum rei publicae spectat*, and is always classed as public law, but still private rights are largely concerned with it. So with the law of contract. Here we have to deal mainly with matters of private concern, but the legality of the transaction—in other words, the public concern in it—is not forgotten. So the criminal law of trespass and the civil law of trespass to a considerable extent

effect the same objects, though in one the public interest and in the other private interest is chiefly regarded.

296. Private law has again been subjected to a classifica- Law of persons, things, and procedure.
tion which is nearly as celebrated, and which is derived from the same source. In the language of the Institutes, 'jus privatum vel ad personas pertinet, vel ad res, vel ad actiones'¹; or, as modern authors say, private law consists of the law of persons, the law of things, and the law of procedure. This classification is just as inaccurate and just as useful as the last. In one sense it may be said of every law, public or private, *ad personas pertinet*. Every law is addressed to persons, bidding them do or not do a particular thing. But the objects of law, as they are called, may be either things or persons: and it is with reference to this division between the objects of law that the classification of private law into the law of persons and the law of things has been made. There are however very few laws of which the objects are exclusively persons or exclusively things. The law, for example, which places the son under the control of the father, gives also to the father the fruits of the son's labour. And even the law which enforces a contract for the supply of goods affects the liberty of action of the contracting parties. Yet no one hesitates to place the first in the law of persons and the second in the law of things¹.

297. The law of procedure can no more be accurately separated from the law of persons and the law of things than these two can be separated from each other. The rules of procedure which compel a man asserting a right, or defending himself against a claim, to do so in a particular way, do in fact constantly affect the right itself. When the judges say that after a certain time has elapsed we will no longer enforce a right, it is impossible to say that this rule of law does not affect rights. So, again, I make a contract. If I make it in a certain form I can sue upon it. If I do not make it in that form, whether I can sue upon it or not depends upon

¹ Inst. I. 2. 12.

the nature of the defence set up by my adversary. This is because of certain rules of procedure. But my rights under the contract are clearly affected. So in the case of adoption under the Hindoo law. Adoption is considered by the Hindoos as a religious act, and respecting, as we do, the religion of the Hindoos, we endeavour not to interfere with it. But we make rules of procedure, and cases have occurred in which adopted sons have lost their rights and sons not really adopted have established their position as such, through judgments based solely upon considerations of procedure.

298. I believe that, as a general rule, absolute duties (duties with no corresponding rights) are classed in public law; whilst relative duties (duties with corresponding rights) are classed in private law.

299. As to the subdivision of private law, it will, I think, be found that in the law of persons we chiefly find rights and duties which are attached to certain classes of the community, that is, a certain indeterminate number less than all. In the law of things we find chiefly rights and duties which affect either individuals or the community at large.

Law of
status.

300. When we find an aggregate of rights and duties attached to certain classes of the community we call that aggregate (as I have explained above¹) a status, or condition. Hence the law of persons has sometimes been called the law of status or condition.

301. The topics usually discussed under the headings, constitutional law, revenue law, and criminal law, are by general agreement placed under public law. Criminal procedure is also placed in public law, and some persons are disposed to include civil procedure also. But most persons agree that whether procedure be placed in public or private law it should be discussed separately.

302. Ownership, possession, security (pledge and mortgage),

¹ Supra, sect. 177.

and servitudes (easements) belong, it is generally agreed, to private law, and to the law of things.

303. The conditions of husband, wife, parent, child, guardian and ward belong also to private law, and to the law of persons.

304. Succession is considered to belong to private law, but, after much discussion whether it should be placed in the law of persons or the law of things, it is now generally agreed to class it apart.

305. Ecclesiastical law I should be inclined myself to class under public law. But it is generally classed by itself, without saying distinctly whether it belongs to public or to private law.

306. Obligations, in the sense of duties which correspond to rights of persons against particular persons (*jura in personam*), are considered to belong to the law of things. But German writers generally class them apart, confining the law of things to rights over things (*jura in re*) which are available against the world at large (*in rem*). Under the law of things thus circumscribed they include ownership, possession, security, and servitudes. Also, inasmuch as the conditions which it is usual to consider under the law of persons are those which belong to the family, German writers have substituted for the law of persons the expression 'the law of the family.' Thus with them the subdivision of private law runs thus:—the law of things, the law of obligations, family law, the law of succession, and civil procedure. I shall adopt an arrangement nearly identical with this.

CHAPTER VIII.

OWNERSHIP.

Rights
over
things.

307. If we consider any material object, such as a field, a piece of furniture, a sum of money, or a sack of wheat, we shall see that various rights exist with respect to it. There is the right to walk about the field, to till it, to allow others to till it, and so forth; there is the right to use the piece of furniture, to repair it, to break it up, to sell it; there is the right to spend the money, to hoard it, to give it away; there is the right to grind the wheat, to make it into bread, to sow it for next year's crop, and so forth.

308. All these rights, which I have spoken of, are rights over the thing available against the world at large: *jura in re* and *in rem*.

Ownership
consists of
rights over
things.

309. If all the rights over a thing were centred in one person, that person would be the owner of the thing: and ownership would express the condition of such a person in regard to that thing. But the innumerable rights over a thing thus centred in the owner are not conceived as separately existing. The owner of land has not one right to walk upon it, and another right to till it; the owner of a piece of furniture has not one right to repair it, and another right to sell it: all the various rights which an owner has over a thing are conceived as merged in one general right of ownership.

310. A person in whom all the rights over a thing were centred, to the exclusion of every one else, would be called the absolute and exclusive owner. This means that no one has any right over the thing except himself. It does not mean that he may exercise his ownership in accordance with his uncontrolled fancy. In the exercise of all legal rights, whether of ownership or of any other kind, each of us is under a certain control arising out of the relation in which we stand to the ruling power or to other members of the society to which we belong. I cannot exercise my rights in such a way as to infringe the law or the rights of others. To take an example: I am the absolute and exclusive owner of a large quantity of charcoal, sulphur and saltpetre. I am still the absolute owner, although the law forbids me to mix them together and keep them in my house. No one by reason of that restriction has a *jus in re* over them. Nor is my ownership affected. The restriction is on my liberty of action only.

311. But if I have pledged the saltpetre as security for a loan, then the pledgee has a *jus in re* over it; and my right to dispose of it is restricted, not by a mere restriction on my liberty of action, but because one or more of the rights of ownership have been detached and given to another.

312. So if I grant a right of way to a neighbour across my land, or if my neighbour has a right to graze his cattle there, he has a *jus in re* over my land, and certain rights have been detached from my ownership and transferred to him.

313. Absolute and exclusive ownership is rare: and yet I do not think it is possible to explain what is meant by ownership except by starting with this abstract conception of it. It is to this that we always revert when we are trying to form a conception of ownership.

314. Ownership, as I have said, is conceived as a single right, and not as an aggregate of rights. To use a homely illustration, it is no more conceived as an aggregate of distinct rights than a bucket of water is conceived as an aggregate of

Absolute
owner-
ship.

Ownership
not an
aggregate
of rights.

separate drops. Yet, as we may take a drop or several drops from the bucket, so we may detach a right or several rights from ownership.

Distribu-
tion of
rights.

315. The distribution of rights detached from ownership which we actually find in use is very extensive. Thus, it would be no strange thing to find a piece of land, and that *A* had a right to till it, *B* a right to walk across it, *C* a right to draw water from a spring in it, *D* a right to turn his cattle on it to graze, *E* a right to take tithe on it, *F* a right to hold it as security for a debt, and yet possibly no one of these persons would be considered as the owner.

Difference
between
ownership
and *jus in*
re alienâ.

316. In such a case as this the owner would be stripped nearly bare of his rights, and it may seem, at first sight, purely arbitrary to continue to call such a person the owner. But this is not so. Though his ownership is greatly reduced, he is still in essentially a different position from that of any other person. So long as the rights I have mentioned are in the hands of any other person they have a separate existence, but as soon as they get back into the hands of the person from whom they are derived, as soon as they are 'at home' as it were, they lose their separate existence, and merge in the general right of ownership. They may be again detached, but by the detachment a new right is created¹.

Descrip-
tion of
owner.

317. However numerous and extensive may be the detached rights, however insignificant may be the residue, it is the holder of this residuary right whom we always consider as the owner. An owner might, therefore, be described as the person in whom the rights over a thing do not exist separately, but are merged in one general right.

318. Or an owner might be described as the person whose rights over a thing are only limited by the rights which have been detached from it².

¹ This I take to be the meaning of the maxim '*nemini res sua servit*'—a man cannot have a separate *jus in re* over his own property.

² I do not attempt to define ownership. The following are three attempts which have been made at a definition:—

'Eigenthümer heisst derjenige, welcher befugt ist, über die Substanz

319. This residuary right, even in its slenderest form, is of great legal importance. It enables the holder of it to assume a position of great advantage in all legal disputes. All (he can say) belongs to me which cannot be shown to belong to any one else. Every one who intermeddles is an intruder, unless he can establish his right to do so. Everybody else must take just what he is entitled to and no more. The presumption is always in favour of the owner ^{Presumption in favour of owner.} ^{tion in} ^{favour} ^{of owner.} ^{1.}

320. Having thus endeavoured to explain the conception of ownership, I now advert to an extended use of the word which has given rise to much controversy and to some confusion.

321. The word 'ownership,' and its English equivalent 'property,' as well as the corresponding words in other languages, dominium, propriété, eigenthum, besides being used to express that relation of a person to a thing which I have just now endeavoured to describe, have been used to describe generally the position of any person who has a right or rights over a thing. Any person having a *jus in re* has been called owner; not indeed of the thing, but of that right ^{Ownership of *jura in re aliena*.} ^{2.} Perhaps this extended use of the term is to be regretted as tending to confuse the conception of ownership. Nevertheless it exists and we must master it. Nor can it be denied that between the ownership of a thing and the so-called ownership of a right there is much analogy. Both owners have *jus in re* and *in rem*. Both can deal with the object of their right (with the usual limitation ^{3.}) as they please. The owner-

einer Sache oder eines Rechts, mit Ausschliessung Anderer, aus eigener Macht, durch sich selbst, oder einen Dritten zu verfügen.' Allgem. L. R. i. 8. 1. 'La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements.' Code Civil, Art. 544. 'The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others.' New York Civil Code, sect. 159. All these definitions seem to me to be valueless.

¹ See *infra*, sects. 844 sqq.

² The ownership of a right is expressly recognised in the Prussian Code. See the quotation in the note above. Also in the Austrian Code, see Allgem. bürgerl. Gesetz B. Art. 353, 354.

³ See *supra*, sect. 310.

ship of the right as well as the ownership of the original thing can very frequently be divided; subordinate rights may be again detached from it and made over to others. Thus, if *A* be the owner of a piece of land, and he lets it to *B* for a term of years, *A* is still the owner, and, as regards him, *B* merely has a *jus in re alienâ*. But, as regards other persons than *A*, *B* will be considered as the owner, not of the land, but of the lease; and if *B* then sell his growing crops to *C*, *C* will have a *jus in re alienâ* as regards *B*, namely the right to come on to the land and take the crops when they are ripe; and there is this further analogy between the position of *A* and *B*, that just as *B*'s detached rights, if they went back to *A*, would merge in *A*'s general right of ownership of the land, so *C*'s detached right to take the crops, if it went back to *B*, would merge in *B*'s general right of ownership of the lease.

322. In the view of some jurists not only is it wrong to speak of the ownership of a *jus in re alienâ*, but it is wrong to speak of the ownership of anything which is not a material object capable of being perceived by the senses¹. It seems to me a strange thing to speak of a thing as erroneous which is universally done; and especially when, after all, the question is only one of convenience—how shall we shape our conception of ownership? The Roman lawyers, as a matter of fact, did speak of the ownership of things which had no corporeal existence. They spoke, for example, of the ownership of a usufruct; and they spoke of the ownership of an *haereditas*; both which the authors of the *Institutes*² have been careful to show are incorporeal; and modern legislation has in the clearest manner adopted the view that things which have an ideal existence may be owned. In England this use of the word ownership has taken deep root.

Ownership
of inven-
tions

323. The long-standing discussion as to the ground upon which authors, artists, and inventors are protected by the law

¹ See Windscheid, *Lehrb. d. Pand. R.* § 168, and the references in the note.

² *Inst. of Just.* 2, 1, 1.

seems to me to resolve itself into a question how you choose to conceive ownership. What we call copyright can only be conceived as a right; that is, as a thing having only an ideal existence. Moreover it is not conceivable as a right which has been detached from ownership, or from any other aggregate of rights, but only as an independent right. It may be described generally as a right to reproduce a certain collocation of words and sentences, or a certain design, and to exclude others from doing so. If we do not admit that there can be ownership of things incorporeal, of course we cannot admit the ownership of copyright. If we do admit the ownership of things incorporeal—and practically most persons do make this admission—then copyright seems to me a very proper subject for ownership, and ‘owner’ seems a very suitable term by which to describe the person who has the copyright. The other way of looking at the matter is to conceive the copyright as a personal privilege of the author, in the same way as we conceive the right of exclusive audience in courts of law as the personal privilege of a barrister, or the right to sit and vote in the House of Lords as the personal privilege of a peer. But whether a right or any particular set of rights is referred to ownership, or whether it shall be referred to personal privilege, or (as it is sometimes called but which comes to the same thing) to personal condition, is after all only a question of convenience. As Austin points out¹, some of the rights in rem over persons have been referred to ownership and some to privilege or condition. The right of a master, for example, over his slave is always called ownership, that of a father over his son in modern times is not so called. This is partly perhaps due to sentiment, partly also because the slave is bought and sold and is a source of wealth, which the son is not². But whatever the

¹ Lect. xlvii. p. 819.

² See Bentham, *Collected Works*, vol. i. p. 136. Blackstone evidently thinks that every right in rem belonging to a person over a person or thing must be a right of property (ownership). Thus, he says, ‘the child hath no property in his father or guardian as they have in him for the

reason may be it would make no difference from a legal point of view, so long as the rights were not altered, if what is now referred to privilege or condition were referred to ownership, and vice versâ.

Ownership
of a cor-
poration.

324. Ownership being the relation of a person to a thing, or to a person considered as a thing¹, the person may be either a human being or a juristical person—a corporation, as we generally call it: and in legal contemplation the ownership of a single individual and of a corporation are the same. But there may be ownership which is neither of an individual nor of a corporation, but of several individuals. The co-ownership of several individuals² is something quite distinct from the ownership of a corporation. If a piece of land or a house is owned by a college, or a quantity of rolling stock is owned by a railway company, neither the members of the college nor the shareholders of the company have any right over or interest in these things whatsoever. If a member of the college without the permission of the college were to enter on the land he would commit a trespass; if he lived in the house he would have to pay rent for it: if a shareholder of the company took away any of the moveable property of the company he would steal. But in co-ownership the individuals themselves are the owners, only the rights of each are necessarily somewhat limited by the rights of his fellows.

Owner-
ship.

325. Of course this case is quite distinct from that in which the several rights over a thing are distributed amongst

sake of giving him education and nurture.' And further on he says of the servant, that 'he had no property in the master.' Comm. vol. iii. p. 143. And a modern editor of Blackstone thinks that, since the wife and child can now recover damages for the injury sustained by the death of the husband or father, they have a kind of property in him. Kerr's Blackstone, vol. iii. p. 134. So too the right of a pledgee is called a 'special property.' Co. Litt. 89 a; 2 Lord Raym. pp. 916, 917. See *Donald v. Suckling*, Law Rep. Q. B. vol. i. p. 595. We have been driven to this by the poverty of our legal language.

¹ See sect. 160 *supra*, and note.

² See sect. 143 *supra*.

several persons; as also from that where a thing consists of parts and each part has a different owner; as, for example, a piece of land with a house upon it, where *A* is the owner of the land, and *B* of the house: or of a gold ring with a jewel set in it, where *A* is the owner of the ring, and *B* of the jewel. We are considering the case where there is but one object and several persons standing in the relation of owner to that object; or, as it has been put, where each ‘*totius corporis pro indiviso dominium habet*’¹.

326. I think it very probable that co-ownership came originally into use as a modified form of what I will call Family ownership. family ownership. There is ground for believing that family ownership is the oldest form of ownership, and very high authorities think that in its original form it was pretty much the same thing as that which we now call corporate ownership². There is no more interesting chapter in legal history than that of the different processes by which this family ownership has been transformed into separate individual ownership, and the intermediate forms of ownership which they have left on the way. These forms survive with us as joint tenancy, tenancy in common, and coparcenary. As far as I am aware the forms of ownership existing on the continent are not materially different. But in India, where the transition from family to individual ownership is still in progress, there are some very peculiar forms of co-ownership, analogous to forms found in Europe, but identical with none. I shall have occasion to speak again of these hereafter³.

327. Ownership, or any of the various rights which make up ownership, may be subject to conditions: that is to say, Conditional ownership. may be made to commence or cease upon the ascertainment by our senses that a certain fact does or does not exist.

¹ Dig. xiii. 6, 5, 15.

² It is not possible to avoid using the word ‘corporate,’ though, of course, it is necessary to be careful in drawing conclusions as to the complete identity of family ownership with corporate ownership.

³ See the chapter on Succession, ss. 780 sqq.

Thus, I may be the owner of a piece of land on condition of paying a certain fixed sum of money annually to the crown ; or I may become the owner of the estate which belongs to you, upon your declining to take the name of a certain family.

Persever-
ing at-
tempts to
tie up suc-
cession to
owner-
ship.

328. I am not now about to discuss the rules which regulate the transfer of the ownership of property, whether inter vivos or by succession, testamentary or intestate. I am however about to refer to them, because many modern ideas upon the subject of ownership were introduced in order to satisfy the eager desire of owners of landed property to direct the course of succession according to their liking, and to thwart the efforts of the legislature to prevent owners from what we call 'tying up' their property. To exercise and extend to the very utmost the power of directing the course of succession to land has been the steady object of owners of landed property in every country of Europe ; and, at this moment, it largely occupies the attention of land-owners in India¹. It has been the policy of the ruling powers in different countries sometimes to increase these facilities, sometimes to diminish them. They were swept away in France by the Revolution of 1792, and have only been very partially restored². In England, though many

¹ See *infra*, sect. 337 note.

² See Code Civil, Art. 896, and the observations of M. Troplong, *Droit Civil Expliqué, Donations entre Vifs et Testaments*, vol. i. p. 138. M. Troplong's observations upon the effect of what at the time was considered a very extreme measure are remarkable. Though strongly repudiating all sympathy with the extreme republican School, he declares his conviction that the abolition of the old law of substitution has been in the highest degree beneficial to France. He says : ' Cette question ne divise plus les esprits. L'abolition des substitutions a pu paraître un coup hardi à la génération qui n'en avait pas fait l'épreuve ; mais l'expérience d'un demi-siècle a démontré à l'époque actuelle les immenses avantages d'un régime de liberté qui laisse la propriété à son mouvement légitime, qui en fait un gage sérieux pour le crédit, et un patrimoine assuré à chaque membre de la famille. Les substitutions étaient un obstacle énorme au développement de la richesse publique. Elles avaient, sans doute, un certain avantage de conservation, mais elles préféraient une immobilité stérile au mouvement fécond qui donne la vie aux intérêts économiques.' The rapid change of ideas which has taken place in England during the

attempts have been made to restrict them, they still exist in a form and to an extent nowhere else ever known.

329. Certain peculiarities of the law of ownership in Eng- Furthered
land have specially tended to favour the exercise of the power by English
of tying up landed property; and, as far as I am aware, notions of
there is nothing analogous to these in any other system of owner-
law, ancient or modern. ship.

330. It is not at all uncommon to find in many countries First, by
two, three or four persons indicated as successive owners of separation
property; the property shifting over from one to the other on of owner-
the happening of certain events. These persons in their turn ship into
become owners of the property, each taking by substitution 'estates.'
for the one who preceded him: each in his turn being com-
plete owner; but each taking nothing till his turn comes.
There is a substitution of this kind in English law, when (as
frequently happens) a man who inherits an estate is compelled
to give up one which he previously held so as to provide for
another member of the family. But besides this the English
lawyers have invented a way of dealing with the successive
ownership of land in a way peculiar to themselves. If land
in England be given to *A*, and after his death to *B*, and after
his death to *C*, and after his death to *D*, these four persons are
not considered, as they would be anywhere else, to be four
successive owners, differing only in the date of the commence-
ment and end of their ownership; each taking by *substitution*¹
their turn as it came, but having nothing till that came.
The English lawyer views them in a far different and
highly technical light. By an extremely bold effort of
imagination, he first detaches the ownership from the land

last few years is very remarkable. When this work was first published, the remarks in the text were considered somewhat hazardous. Since then a measure radically affecting the principles of the English land law has been carried almost without a dissentient, and further reforms are promised.

¹ This is a technical term of French law; it was by means of substitutions that succession was tied up under the old French law, and it was by the abolition of substitutions that the great change was effected; see Code Civil, Art. 896.

itself, and then attaches it to an imaginary thing which he calls an estate. This enables him to deal with ownership in a more fanciful way than if it were attached to the soil. He treats the ownership of the 'estate' in perpetuity as something out of which he may carve (to use his own expression) any number of slices, and confer each slice upon a different person; each of whom, though he may have to wait a long time for his enjoyment of the property, is nevertheless the present owner of his slice. English lawyers do not seem to consider this mode of dealing with ownership as anything peculiar; but it nevertheless is peculiar to English law. Other nations share with us the idea that, as certain events arbitrarily chosen may happen, the ownership of land may pass from one person to another; and have invented contrivances, which are, for the most part, restrictions on alienation¹, to insure that, when the event happens, the land shall so pass. But the notion of an 'estate,' as it is called, is, I think, unknown in any system which has not taken it directly from us; and tricks have been played with the ownership of an 'estate' which could hardly have been ventured on with the ownership of the land itself. If I give an estate in my land to you for your life, I am not looked upon as having parted with the land altogether for this indefinite period, at the end of which it will come back to me, or go to some other person. According to the language and ideas of English lawyers the land is in one sense yours, but still remains in another sense mine; and with what is mine I may deal.

331. It is true that the results of both devices for controlling the succession to the ownership of land are very often the same. It might come to pretty nearly the same thing, whether I gave land to my eldest son for life, and after his death to his brother, or 'substituted' my younger son for my elder, on the death of the latter. But it does not

¹ The 'shifting use' of English real property law is very little more than a well-conceived device for preventing alienation.

follow from this that the existence of two different devices does not widen the facilities for tying up succession, though this is not the point to which I now wish to draw attention. What I wish to establish is, that the English method of dealing with the ownership of land is peculiar¹.

332. A case has arisen in India which is remarkable as being one to which it was open to apply either the English or the more general notion; and the actual determination of it may have no little influence on the future development of law in that country. If a Hindoo dies leaving a widow, she sometimes takes his property, but her ownership terminates at her death. It would have been perfectly in accordance, therefore, with English ideas, though contrary to the general ideas of jurisprudence, to treat her—not as unlimited owner of the property for the limited time, the ownership shifting over at her death to the next taker—but as owner only of what we should in England call an estate for life; the next taker being at the same time present owner of the rest. But this is one of the instances in which English lawyers have escaped the error of transferring into a foreign system the ideas peculiar to their own. The widow in India, though her ownership lasts only for life, has (as the phrase is) the whole estate vested in her; and the next taker after the widow has, as he would have in most countries under similar circumstances, nothing, until his turn comes by the death or other determination of the widow's ownership, when the whole shifts over to him.

333. There are many other things which an English land-owner, but no other landowner, is permitted to do. For ^{Leases for long terms of years.}

¹ I confine my observations to land, although the ideas of English law relating to other species of property, the funds for instance, possess some peculiarities; but I have selected land as the best for purposes of illustration. Nor do I wish to indicate it as my opinion that these ideas could be wholly swept away: though I cannot conceal my opinion that they might be advantageously simplified. This simplification is not effected by the recent Settled Estates Act, though some evils are mitigated; but it is not improbable that a further advance may be made.

instance, whilst it is common everywhere for the owner of land to be allowed to separate the right to use and enjoy the land from the ownership, and to confer it on some person for a limited period, this period has generally been a short one, conterminous with the life of the grantee. English lawyers have adopted the strange device of separating the use and enjoyment of the land from the ownership for periods of as much as a thousand years. As a thousand years is for all practical purposes equivalent to a perpetuity, this is a new mode of creating an owner; the right to use and enjoy being unlimited. The incidents of this ownership, which we call the ownership of a 'term,' are not the same as the incidents of the ownership of an estate for life, or in tail, or in fee. The owner of the term is the owner of a *jus in re alienâ*. It is for this very reason that the device is resorted to, in order to satisfy the capricious fancies of landowners. It might create a little immediate inconvenience, but it would vastly simplify the law and be a great benefit to posterity, if every grant of the use and enjoyment of land for more than one hundred years were declared to be equivalent to a grant in fee.

Restric-
tions on
aliena-
tion.

334. But there is a more extraordinary device still. Every civilised country has arrived at the opinion not only that land may be alienated, but that a free power of alienation is a necessity of well-being. The English law, like all other systems of law, has clearly laid down the principle that restrictions upon alienation are objectionable, and in a general way illegal. 'Also if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void; because when a man is infeoffed of lands or tenements he hath power to alien them to any person by the law¹.' These are the words of Littleton, and the principle they lay down has been reaffirmed by judges innumerable down to the present day². And yet every day the prohibition is avoided, and the owner of land is restrained

¹ Littleton, s. 360.

² Tudor's Leading Cases in Real Property, p. 971.

from alienating by an artifice which is too transparent to deceive a child. The power of alienation is detached from the ownership of the estate when the estate is parted with, and is either retained by the grantor, or given to some one else. Thus the ownership goes one way and the power of alienation goes another. The policy of the law is that they should go together. The evil is that a man should not be able to get rid of land which he cannot manage usefully or profitably. The land gets into a bad condition, and this great source of wealth is diminished. An impoverished owner is an evil, but this is an evil which has a tendency to cure itself, for an impoverished owner is almost always willing to sell.

With us it is possible to check that tendency by putting the power of sale into the hands of a person who is not the owner, and who has been selected expressly because he is not likely to be willing to sell¹.

Powers of
sale by
persons
not
owners.

335. Another peculiarity of the English law of ownership arises out of the very strange conflict between common law and equity. To take a simple case:—If I give land to you in trust for myself, at common law I cease to be the owner, in equity I continue to be so. How this came about is an inquiry which belongs to the history of English law, and need not be now pursued. It is only noticed here as an idea of ownership by which the attempts at simplifying the notions comprised under that term have been eluded. The Court of Chancery, had it confined itself to compelling owners of property either to fulfil certain fiduciary relations, such as those of guardian and ward, or to fulfil the wishes of persons from whose bounty they had received the ownership, would have kept within the limits of analogous institutions in other systems of jurisprudence. Had too this been done, not only in those cases where there are special reasons for the exercise of good faith, but in all cases alike, where the owner of land

Separation of
legal and
equitable
owner-
ship.

¹ This evil is lessened by the Settled Estates Act. It remains to be seen how far land becomes easily saleable under that Act. Much depends upon the attitude of the Courts.

had accepted the ownership subject to a condition to exercise his rights for the benefit of some other person, and the ordinary remedies of law were insufficient to compel him to do so—this would have been a stretch perhaps of the doctrines of equity, but would have been very likely beneficial, and would have introduced no entirely new principle. But the English Court of Chancery has done a great deal more than this. It has created an entirely new interest in land; an interest as comprehensive, as general, as beneficial, as transferable, as ownership itself—which *is* ownership in fact, only the rights of the owner are somewhat clumsily exercised; and so it is frequently called. This equitable ownership, or use, or trust estate, or whatever other name we may give it, exists side by side with the common law ownership, and there is no immediate prospect of this double ownership being got rid of. It has been said that the Courts of Common Law are to blame for this conflict; that it is to their action, and not to the action of Courts of Chancery, that the anomaly is due. It is not the least worth discussing which of these charges is correct. The important thing is to get rid of this double ownership as quickly as possible: and now that the conflict of jurisdiction out of which arose this conflict of law is abolished it ought not to be difficult to accomplish this reform¹. Simply to recognise the equitable owner as legal owner would effectually cause the anomaly complained of to disappear, and it would not be in any way difficult to provide some new method of enforcing upon owners of property certain fiduciary and other obligations, such as are recognised in all modern systems of jurisprudence, but which, in common with the whole system of trusts, depend in England upon this anomalous double ownership.

No
analogy to
our equitable

336. The doctrine of the English Court of Chancery in respect of ownership has been compared first to one, and then to another institution of the Roman law; and if only the

¹ I doubt if we are nearer to it now than we were twenty years ago, and I do not think any attempt is being made to bring it about.

germ of it were to be there found, its existence in any modern ^{ownership} system would be more easily accounted for. But there is ^{in Roman law.} nothing like it. There is to be found in the Roman law a body of rules supplementing the old stricter law, something like our system of equity. There was what was called bonitary ownership and what was called quiritary ownership; and in theory these two kinds of ownership might co-exist. But where there was a bonitary owner the quiritary owner was entirely excluded. For all practical purposes there was but one owner; there was no conflict. There are also to be found well recognised in the Roman law certain relations of a special fiduciary character, which are governed by special rules framed with a view to their nature. Hence much that takes place in our Courts of Chancery, where similar fiduciary relations are specially considered, has its analogy in Roman law. But there is nothing in the Roman law analogous to the relative position of the common law and equitable owners of property. The point of contact has been supposed to be, where the prætor, exercising what may be called his equitable jurisdiction, enforced what was called a *fidei commissum*. But there was not, as in England, any conflict of ownership in such a case. What the prætor did, was to compel the transfer of the ownership in accordance with the fiduciary request. The other institution of Roman law which has been referred to as analogous to the Chancery ownership is what is called *usus*; and in former times (probably in reference to this supposed connexion) what we now call *trusts* were then called *uses*. But the Roman *usus* was a wholly different and a far less comprehensive conception. When the Roman owner of a house granted the *usus* of it to another, there was nothing fiduciary in the matter; and the relation created was very like that of an ordinary tenant to his landlord. It was, as the name imports, a right to occupy and make use of the house. It was however a right over the thing available against all the world, and therefore a fragment of ownership: but the grantor remained owner, he did not even lose the

possession of the house. And the same was the case with the more extended right of usufruct. The grantee of the usufruct had not even the possession; he had only the bare physical detention, which he held on behalf of the owner. And both these rights were classed among servitudes; with rights of way, rights to support, and so forth¹. The leading features of the relationship between the common law and equitable owner in England are wholly wanting—namely, trust and conflict. The rights of the grantee of the Roman use no doubt derogate from the absolute ownership, but the rights of the grantee and the rights which remain in the owner stand clearly separated, and each may use his rights for his own benefit. In England the common law rights of one owner and the equitable rights of the other are constantly in conflict, and the common law owner would be restrained by the Court of Chancery, if he attempted to use a single right on his own behalf².

Why it is
desirable
to observe
these pec-
uliarities.

337. I have noticed these peculiarities of the English law at some length, and have pointed out the fallacy of linking them with institutions of a wholly different character, chiefly because of the very peculiar position which English lawyers occupy, with reference to the law which they are called upon to administer. Englishmen are frequently transferred from the arena of the English courts, and the familiar practice of the English law of real property, to countries in which they have to apply systems of law, which are either altogether different from their own, or which are to a large extent incomplete. Under such circumstances it is certain that we shall

¹ The force of this distinction will appear more clearly from the Chapter on Possession.

To the reader who has had no experience of the working of English courts it may seem impossible that these conflicting views could co-exist in any one system. The Courts of Chancery, however, ingeniously contrived to avoid a direct conflict with Courts of Law by giving decrees which were in form only in personam. If the Courts of Law declared *A* to be the owner, the Courts of Chancery did not deny it, but took measures to compel *A* so to act as to give the real enjoyment of the property to *B*.

be strongly tempted to transfer into the new system the ideas we take with us. Some such transfer may be in some cases forced upon us—in India it certainly has been so—as the only safe and practical method of filling up the huge gaps in the declared law of that country. But it is most important in all such cases, to distinguish between that which is in consonance with the ideas common to most systems of jurisprudence, and that which is anomalous and peculiar to our own. Ideas of the former kind it is sometimes not unsafe to transfer. But to transfer ideas of the latter kind is always very dangerous. The imported principle does not easily fit in with the institutions of the country into which it is introduced, and consequently its introduction is very likely to throw the whole law of that country into confusion¹.

338. The ownership of land in England is often said to be based on feudal ideas—that is, upon ideas impressed upon it by the feudal system. It is worth while to inquire what particular form the ownership of land assumed under that system. This form of ownership is what English lawyers call ‘tenure.’ The word ‘tenure’ indicates, as the books tell us, the feudal relation between a tenant of land and his lord. Now at all times and in all places we find cases in which, two or more persons having rights over a thing, some sort of relation exists between them arising out of those rights. The peculiarity, therefore, of the case under consideration must

Feudal
nature of
English
land-
owner-
ship.

¹ The recent attempts to employ English conceptions of ownership for the purpose of tying up the succession to property in Lower Bengal, are probably intended to counteract the effects of the impulse given under British rule to the counter notion of the right of absolute alienation. It is a curious history. Owners of landed property in Bengal met the introduction of English ideas as to the absolute right of alienation *inter vivos* by demanding the right to make a will, declaring the course of succession. This was again met by insisting that, if this were allowed, the English restrictions on perpetuities must also prevail. It may indeed be well doubted whether this method of proceeding can be justified, either legally or politically. Perhaps a compromise acceptable to the natives of India may be one day arrived at, by putting some restrictions on the caprice or prodigality of a single heir, without a wholesale introduction of our cumbrous English law of real property.

be sought not in the existence of the relation, but in the nature of it. What is there peculiar from a legal point of view in the feudal tenure?

Various
forms of
feudal
tenure.

339. In examining the nature of the feudal tenure one meets with the preliminary difficulty that it originally manifested itself in very various forms in different parts of Europe: and some of these forms had probably penetrated into England before the Norman conquest. After the Norman conquest the Frank type of feudalism became predominant, but from the moment it was planted in English soil it became subject to local influences. It is, therefore, a very difficult thing to give a description of tenure which would be accurate and complete. But for my present purpose this is not necessary. All I am now seeking for is the legal characteristics which distinguish the feudal tenure. And whatever discussions there may be about minor points, the broad legal characteristics of the feudal tenure are well established. In all cases of feudal tenure we find ourselves in presence of two persons—an owner of land, and one who has rights over the land derived from the owner. We also find that there is some kind of mutual obligation between the parties, which obligation (however it may have originated) does not depend for its continuance on any contract between the parties, but is attached to the land. Further, we find that the grantor has parted with the whole use and enjoyment of the land to the grantee; but though the rights of the grantor are thus reduced to a mere right to receive that which has been agreed on, yet the grantor and not the grantee is considered to be the owner of the land; the grantee being merely owner of a right over a thing which belongs to the grantor. But still there is nothing peculiar in any one of these characteristics. They are to be found in the emphyteusis of the Roman law; and in the modern tenancies of a farmer or other lessee, which are not feudal. There is, however, one thing which distinguishes the feudal relation from all other relations between the owner of land and his

Chief pe-
culiarity
of feudal
tenure.

grantee. This consists in the introduction of a very stringent personal relation between the grantor and grantee, or, to use the feudal expression, between the lord and his tenant. This personal relation was created separately from the grant of the jus in re, but as soon as it was created it became inseparably annexed to it, and with it constituted the feudal tenure. It was not concluded in the form of a contract, or of a gift upon condition, but of submission: the tenant binding himself by oath to be faithful to his lord, and the lord undertaking to protect his tenant. Services were attached to the tenure, which varied, and might be altogether absent. But the one essential and distinguishing feature of the feudal relation was the obligation of mutual defence and protection.

340. The political importance of such a relation was immense, and in turbulent times it held out great advantages. It was a bond of union as close as that of kinship, which it probably to some extent replaced. It was a ready means of political and military organisation, and it was so used. In England it was carried so far as to embrace the ordinary relation of sovereign and subject, which was united to tenure by the fiction that all land was held ultimately of the king.

341. It is, I think, obvious that the importance of the feudal system is due almost entirely to the use which was thus made of it for political and military purposes: its special juristical features (if indeed it has any) appear to be mostly accidental. The reciprocal duties of lord and tenant could easily have been created by contract and enforced by action without any legal innovation. That they were not so created and so enforced was a mere matter of convenience. That they were in reality matter of negotiation and arrangement there can be no doubt. Even some of the services which are considered specially feudal, because they are found annexed to the feudal tenure, and have not been found except in that connexion in Europe, are common enough in India. The ghatwals of Lower Bengal, for example, the holders, that is, of the agri limitrophi bordering upon hills occupied by hostile

Political
rather
than legal
importance
of it.

tribes, are bound to guard the ghats or mountain passes as a condition of their holding. Nothing is wanting but homage to make their relation to the rajahs, who granted them their lands, a feudal one. But just because homage is wanting it seems to be quite unwarrantable to speak of this relation as feudal.

Feudal
tenant an
owner.

342. The incident of feudal tenure that the feudal tenant enjoys all the rights of an owner, and yet has only *jus in re alienâ*, is found in many other arrangements for the enjoyment of land. The grantor of the *emphyteusis* as completely severed his connexion with the land as the feudal lord: the rights of the *emphyteuta* might be as full and general as those of any feudal tenant; yet the former was still *dominus* and the latter had only *jus in re alienâ* down to the very latest period.

Feudal
tenure
unsuited
to modern
require-
ments.

343. As soon as people came to rely for protection not on the feudal relation, but on the ordinary courts of justice and on the government, a feudal tenure ceased to be anything more than an arrangement, and that a clumsy one, for adjusting the pecuniary interest of the superior owner in the lands which he had granted away. Its vagueness gave great power of oppression, and it was in many ways objectionable. These objections have been removed, but the thing itself, which is now a mere shadow, remains. It does no good and it does some mischief, by the perpetuation of obsolete forms. But it is desirable to remember that the abolition of the remaining traces of feudalism would not, if the above observations are correct, suffice to cure the evils of the English land law. Those evils are due, not to feudalism, but to the contrivances by which English lawyers have been allowed to elude the wholesome maxims which have prevailed elsewhere. In almost every case where the law has forbidden something with regard to the land, the lawyers have set about doing the same thing with regard to an 'estate' in the land. When not allowed to do it with the 'estate' they have done it with the 'use.' When not allowed to do it with the 'use' they

But
modern
evils not
all due to
feudalism.

have done it with the 'trust,' or with the 'term.' Much more than a complete eradication of feudal ideas is necessary to counteract these devices.

344. There are many points of view from which, and many purposes for which, it makes no difference who of several persons having rights in rem over a thing is considered the owner. The rules as to the mode in which the right is to be enforced if denied, or recovered if lost; the rules by which it is transferred or inherited; and generally its legal aspect, will be the same whether the person claiming the right be considered as owner or not. But two very important questions which lie at the bottom of all contentions as to the ownership are these—to whom do the accessions belong? and upon whom in an action does the burden of proof lie?

345. These are the two questions which are at the bottom of the controversy which has been so long carried on in India as to the ownership of land. At first sight it does not appear to be so very important who is called the owner, and it is only when we perceive the immense advantage of the presumptions attached to ownership that we become aware of the importance of it; and of the necessity of being very careful to whom we give this advantage, and on what conditions.

346. This was the problem which presented itself for solution to the Indian Legislature in Bengal at the end of the last century. It does not appear that Lord Cornwallis and his advisers fully apprehended the nature of the problem. Being mainly dependent for their resources on the land revenue, they naturally inclined to make the person who had hitherto discharged that burden still liable for it, and at the same time to declare him the owner. In this they were probably right; indeed they could have hardly done otherwise. But probably because they did not perceive the dangerous position in which they thereby placed all the other persons who had claims on the land, they did nothing to protect these persons: simply leaving them to prove their rights against the landowner if they could. Practically this was in a vast

number of cases impossible, and numberless subordinate tenure-holders had to succumb. Obviously what should have been done was, contemporaneously with the grant of ownership to the zamindars (landholders) the rights of all the under-tenants should have been recorded and confirmed. This is what has been done in other parts of India. In Bengal, after years of misery and injustice, the legislature has been compelled to step in and endeavour to redress the grievances of the under-tenants¹.

¹ See the Bengal Tenancy Act (Act VIII of 1885). A story which illustrates the difficulties of the land question in India was told by Lord Lawrence when the question was being debated in the Indian Legislative Council, as to who were the owners of the land in the Punjab. Happening on one occasion to meet a party of hill-men he asked, pointing to the hill side, Whose land is this? 'Ours,' they all exclaimed. Then he went to some of the chief men in the village and asked the same question. 'The land is ours,' said they. Then he went to the Rajah, and again asked the same question. 'The land is all mine,' replied the Rajah, 'to whom else should it belong?' Each of these parties had certain jura in re over the land, and might, in a sense, have proved their assertions without settling any real dispute. The injustice that was done by simply declaring the zamindar to be the owner without making any provision for the protection of the rights of the raiyat is graphically described in the Introduction to Sir William Hunter's Bengal Manuscript Records.

CHAPTER IX.

POSSESSION.

347. In the former editions of this book I based my observations on possession entirely upon Savigny's well-known treatise on the subject. I did so because at that time it seemed to me that Savigny's treatise was the only one which gave a clear and consistent statement on the subject. Savigny's treatise is founded upon the Roman law, and consists in a great measure of minute criticisms of the Latin texts, and an exhaustive inquiry into the actual views on possession held by the Roman lawyers. It is not these parts of Savigny's works of which I made use. What I borrowed was his analysis of the general conception of possession.

I still propose to make considerable use of Savigny's analysis. It is clear and forcible, and is quite capable of being made the basis of a rational and consistent system of law. But I shall also refer to a different conception of possession, that of the late Professor Ihering, which has found favour with many persons.

We also now possess a systematic treatise on possession in the English language of the highest value, to which I shall also frequently refer¹.

¹ Savigny's treatise was originally published in 1803. The later editions published in the author's lifetime were considerably altered by him. The last edition was published at Vienna in 1865. It has been translated by Sir Erskine Perry. Ihering's treatise (*Der Besitzwille*) was published at Jena in 1889. Pollock and Wright's *Essay on Possession in the Common Law* was published at the Clarendon Press in 1888.

Physical
idea of
possession.

348. Possession originally expresses the simple notion of a physical capacity to deal with a thing as we like, to the exclusion of every one else. The primary and main object of ownership is the protection of this physical capacity; and, as pointed out by Savigny¹, if this physical condition had alone to be considered, all that could be said upon possession from a juristical point of view, would be contained in the following sentences:—The owner of a thing has the right to possess it. Every one has the same right to whom the owner has given the possession. No one else has that right.

Legal idea
of posses-
sion.

349. The legal notion of possession, however, is not confined to this simple physical condition. Possession is treated in law, not only as a physical condition which is protected by ownership, but as a right in itself. From possession, under certain conditions, important legal consequences are derived; and in advanced systems of law the right of possession is frequently separated from the right of ownership. Moreover, the possession with which the law thus deals is not that simple physical condition which we have described above, and to which, for the sake of distinction, therefore, we give the name detention. It is true that the physical element is never altogether lost sight of; on the contrary, a physical element of some kind or other is essentially necessary to possession in its widest legal sense, as we shall see in the sequel. But this physical element greatly varies under rules prescribed by law.

350. So also, inasmuch as possession is a right in itself, rules are laid down by the law, as in other similar cases—in the case of ownership, for instance—which prescribe the mode in which it may be gained or lost.

Legal con-
sequences
of posses-
sion.

351. There has been a good deal of controversy in Germany upon the question, What are the legal consequences of possession? Savigny maintains² that the Roman Law (from which, no doubt, modern jurists mostly derive their ideas on the subject) attributed only two rights to possession; namely,

¹ Sav. Poss. s. 1, p. 27.

² Ib. s. 2, p. 29.

the acquisition of ownership by possession (*usucapio*), and the protection of possession from disturbance (*interdictum*)¹. Other lawyers would include, as legal consequences of possession, the acquisition of ownership by occupancy or delivery; the advantage which the person in possession has, in a contest as to ownership, that the burden of proof is thrown upon his adversary; the right to use force in defending possession; the right of the possessor, merely as such, to use and enjoy (to some extent) the thing in possession; and some other advantages of a more intricate kind. This controversy is one which it is not necessary for us to pursue. Every known system of law attributes *some* legal consequences to possession; and even in cases in which it may be, strictly speaking, incorrect to attribute legal consequences to possession, as in the case of occupancy or tradition, the acquisition of possession may yet be an important element of inquiry, and the subject of legal regulation.

352. I will now proceed to consider what is the conception of possession in a legal sense; and I will first examine the physical element which, as I have said, lies at the bottom of the conception of possession.

353². It is very common to say that possession consists in the corporal seizure or apprehension of the thing possessed by the possessor, and that, in all cases where this corporal contact does not exist, there is not a real, but only a fictitious possession. And there has been derived from this a theory of symbolical possession, which Savigny considers to be not only erroneous, but to the last degree confusing, when we come to deal with practical questions, and which he has taken great pains to combat. The truth is that, though we undoubtedly do possess most of the things with which we are in corporal contact, and though we come into corporal contact at some time or other with most of the things which we possess, corporal contact has nothing whatever to do with the matter. A man walking along the road with a bundle sits

Physical
element in
the con-
ception of
possession.

Contact
not neces-
sary.

¹ Sav. Poss. s. 3, p. 32.

² Ib. s. 14, p. 206 sqq.

down to rest, and places his bundle on the ground at a short distance from him. No one thinks of doubting that the bundle remains in his exclusive possession, not symbolically or fictitiously, but really and actually; whereas the ground on which he sits, and with which he is, therefore, in corporal contact, is not in his possession at all. So, as Savigny puts it very forcibly, a man is bound hand and foot with cords—no one thinks of saying that he possesses the cords; it would be just as true to say that the cords possess him.

354¹. Corporal contact, therefore, is not the physical element which is involved in the conception of possession. It is rather the possibility of dealing with a thing as we like, and of excluding others. If we consider the various modes in which possession is gained and lost we shall recognise this very clearly.

Acquisition of possession of land.

355². Take, for instance, first the case of land. A man buys a piece of land. He pays the price, and both parties sign the contract of sale. The buyer goes to take possession. It is not necessary for him to come into physical contact with every part of the land by walking all over it. He enters upon it and stands there; the seller withdraws or signifies his assent; and the buyer is at once in full possession. This is on the supposition that the claim to take possession is unopposed. If the seller is there and disputes the purchaser's right to take possession, however unjustly, or if a third person is there who disputes the right of both, all the walking upon the land in the world, until this opposition is overcome, will not give the buyer possession; and for this reason—because the physical element which is necessary to put the buyer in possession is not corporal contact, but the physical power of dealing with the land exclusively as his own. In such a case there are but two modes in which he can obtain possession—either by inducing those who oppose him to yield, or by overcoming their opposition by force.

356. It is not necessary in order to obtain possession that the purchaser should step on to the land at all. If it is near

¹ Sav. Poss. s. 14, p. 211.

² Ib. s. 15, p. 212 sqq.

at hand, and the seller points it out to the buyer, and shows that the possession is vacant, and signifies his desire to hand it over to the buyer, whilst the buyer signifies his desire to receive it, enough has been done to transfer the possession. The physical possibility of the buyer dealing with the thing exclusively as his own, which is all that is necessary, exists, whether he thinks proper to use it by stepping on to the land or not.

357. If we consider what is necessary in order to retain possession, we shall find the same notion more strikingly exemplified. In order to retain possession, it is not necessary that the possessor should remain on or even near the land. Possession having been once received, it is not necessary that the physical power of dealing with the land as he pleases should be retained by the possessor at every moment of time. He will continue in possession, if he can reproduce that physical power at any moment he wishes it. A man who leaves his home, and goes to follow his business in a neighbouring town, may still retain possession of his family house and property.

358¹. An examination into the mode of acquiring the possession of moveable things will lead us to the same result. Possession of moveable things can undoubtedly be taken, and very frequently is taken, by placing oneself in corporal contact with them. I can take possession of money by putting it into my pocket; of a coat by putting it on my back; of a chair by sitting upon it. But this contact is not necessary. I should take possession of the money just as well if it were laid on the table before me; of the coat, if it were put into my wardrobe; of the chair, if it were placed in my house. In the same way, if I purchase heavy goods lying at a public wharf, I take possession of them by going to them with the seller, and by his there signifying his intention to deliver them, and by my signifying my intention to receive them. So also, if I buy goods stored in a ware-

Possession
of land
how re-
tained.

Acquisi-
tion of pos-
session of
move-
ables.

¹ Sav. Poss. s. 16, p. 216.

house, possession is given to me by handing over the keys. So too, timber is delivered by the buyer marking the logs in the presence of the seller; not because of the corporal contact or prehension which takes place in marking, but because that is the intention of the parties. The marking might take place without any change of possession; as for instance, if the logs were marked to prevent their being changed, but they were not to be delivered till the price was paid¹.

359. In all these cases it is a great mistake to suppose that there is anything fictitious, or symbolical, or constructive in the acquisition of possession. Each case depends on the physical possibility of dealing with the thing as we like, and of excluding others. In all the cases above put, except two, the thing is actually present before us. But in one of these two, namely that in which we say possession is taken by placing the thing in my house, we only apply to a particular case a well-known principle, which embodies the very idea we are now insisting on; namely that a man has the actual custody of all that is in his house, by reason of the complete and exclusive dominion which he has over it². The other of these two cases is that in which the keys of the warehouse, where the goods are stored, are handed over by the seller to the buyer. But there cannot be a more complete way than this, of giving to the buyer the power of dealing with the things sold exclusively as his own³.

Possession
of move-
ables how
retained.

360. And as in the case of immoveable things, so in the case of moveables, when possession of them has once been taken, it may be retained so long as the power exists of reproducing the physical capacity of dealing with the thing and of excluding others. Thus, if after handing over and receiving possession of goods at a public wharf both buyer and seller go away, the goods remain in possession of the buyer. Not so, however, if the goods are in the warehouse of a private person, unless the owner of the warehouse

¹ Sav. Poss. s. 16, p. 219.

² Ib. s. 17, p. 226.

³ Ib. s. 16, p. 223.

agrees to give the buyer the use of the warehouse as a place for keeping his goods.

361¹. Instructive illustrations of the conception of possession may also be gained by a consideration of the possession of live animals. Those animals which ordinarily exist only in a domestic state, such as cows and horses, hardly differ from other moveable property. Animals, on the other hand, which are in a wild state, are only in our possession as long as they are so completely in captivity that we can immediately lay hold of them. We do not possess the fish in a river, even though the river, and the exclusive right of fishing in it, belongs to us. We do not even possess the fish in a pond, if the pond be so large that the fish can escape from us, when we go to take them. But we do possess fish, when once they are placed in a stew or other receptacle, so small that we can at any moment go and take them out. Animals that have been born wild, but have been tamed, are generally considered to be in the same position as animals which are born tame, so long as they do not escape if let loose. A wild animal that has been wounded mortally by us, is not in our possession until we have laid hold of it; for not only is the physical control yet wanting, but a thousand things may happen which will prevent us ever getting it. Another larger animal may seize it and carry it off; it may get into a hole; we may lose its track; and so forth².

Capture of
wild
animals.

¹ Sav. Poss. s. 31, p. 342.

² For the purpose of explaining possession, I state the law relating to the capture of wild animals as derived by continental lawyers from the Roman Law. This law has, in England, been very considerably modified, by reason of the more exclusive privileges generally conceded to owners of land. There is not the least difficulty in a man having possession of that of which he is not the owner; and it was not inconsistent with the idea which attaches to our word 'close,' to treat the owner of enclosed land as in possession of all the game which at any time happens to be there. If so, it was correct to decide (as has been decided) that when a trespasser kills game on my land the game is mine. See the case of *Blades against Higgs*, reported in the *Common Bench Reports*, new series, vol. xx. p. 214. But the idea analogous to that expressed by the word 'close' hardly existed under the Roman Law, and I doubt if there

Loss of
possession
of move-
ables.

362. The consideration of the modes in which possession is lost will make the result clearer still. Every act by which our physical control is completely destroyed puts us out of possession. It makes no difference whether the person who does the act himself gains possession thereby, or indeed whether any one does so. Thus, if I take anything belonging to you, and throw it into the sea, you lose possession, though no one gains it. We may also lose possession of a thing, not only by the act of another person in removing it, but simply because, under the circumstances, we cannot any longer exercise that control; as, for instance, if a tiny jewel drops from my hand in passing through a dense forest, or if a captured animal of its own accord escapes back into the wild. So also, if we leave a thing somewhere, but cannot recollect where, and search for it in vain, we have lost possession of it. There is said to be an exception to this where the thing, though it cannot be found, is still in the owner's house, or on his adjoining premises; as, for instance, if I drop a coin in my garden, and cannot, on searching, find it, it is said that I do not lose possession of it. But there is a reason for this which shows that it is no real exception. Everything in a man's house, and in his garden, is, on a principle already adverted to¹, and widely recognised by the law, considered to be in the immediate custody of the owner of the house and garden, by reason of his exclusive control and dominion over them and all persons residing therein.

363. On the other hand, a man does not lose possession

is anything quite analogous to it on the continent. We find, however, that the French Law does not apply the restrictions as to killing game to a person doing so '*dans ses possessions attenant à une habitation et entourées d'une clôture continue faisant obstacle à toute communication avec les héritages voisins.*' Loi du 3 Mai, 1844, sur la police de la chasse; art. i. sect. 2. This is probably because the nature of the locality is inconsistent with the absence of possession, and the absence of possession *as well as* ownership is assumed in all the French laws on the subject of game. See *infra*, sect. 482.

¹ *Supra*, sect. 359; Sav. Poss. s. 31, p. 340.

of a thing by leaving it in a place which he knows, and to which he can return. Thus, if I leave my hatchet in a wood, intending to return the next day and continue my work, I retain possession of the hatchet all the time¹. But if any one else should find it, and should take it away, from that moment I lose possession.

364. The same general rule applies to the loss of immovables. The possession lasts so long as there is any physical control over them, and ceases when that physical control ceases. I do not lose possession of my house by filling it with my friends and servants, even if I should go away, and leave them there. But should they, on my return, refuse me admittance, declining upon some pretext to acknowledge my rights as owner, then, until I have ejected them, I have lost possession.

365². There was a rule in the Roman Law that if, in my absence, a piece of land, which had hitherto been in my possession, was occupied by another, who would oppose me if I attempted to return and exercise my rights over the land, I did not thereby lose possession until I was informed of the intrusion. Such a rule is clearly in conflict with the notion of possession, as it has been developed above. The physical power of dealing with a thing as we like being necessary, according to our conception, to constitute possession in a legal sense, it follows that when I have lost this, whether I know it or not, I have lost possession. The question then is, whether we must, in consequence of this rule, modify our general conception of possession, with which it does not harmonise? Savigny has examined this at great length, and has decided that we ought not, but that it ought to be treated as an exceptional case. It is in fact a fiction, introduced, as fictions generally are, to avoid consequences that are considered to be inconvenient or unjust. The fiction is that I remain in possession when I have really ceased to be so; and

¹ Sav. Poss. s. 31, p. 341.

² Ib. s. 31, pp. 348, 353.

it no more modifies the general notion of possession than the similar fiction on which was founded the old action of ejectment. It has never (as far as I am aware) been extended to moveables; and, of course, it can be applied only in those systems of law in which it has been expressly recognised.

Mental
element in
concep-
tion of
possession.

366¹. The physical element, however, in Savigny's opinion, forms only one portion of the conception of possession. Besides this, he considers that there is what I may call a mental element, without which the physical relation will remain as a mere fact, having no legal consequences, and not in any way subject to special legal considerations. In order to constitute possession in a legal sense, there must exist, not only the physical power to deal with the thing as we like, and to exclude others, but also the determination to exercise that physical power on our own behalf.

Transfer
of deten-
tion with-
out posses-
sion.

367. This important feature in the legal conception of possession may be illustrated by the consideration of a simple case. A person has a valuable article of jewelry which he wishes to send from London to his house in the country; and for that purpose he gives it to his servant with instructions to take it to his house, and there deliver it to his wife. The servant does not thereby gain possession of the jewelry, nor does the master lose it. True it is that the servant has the physical control over the jewelry; but, if he is obedient to his master's orders, he has no intention of exercising that control upon his own behalf. The master, on the other hand, by delivering the jewelry to his servant, does not for one moment lose possession of it, if his orders be carried out. Through his servant, who is obedient to his orders, he has the physical control which is necessary to possession; and he has also determined to exercise that physical control on his own behalf.

Transfer

368. The position, that possession (in a legal sense) con-

¹ Sav. Poss. s. 20, p. 246. From this point Savigny's views are contested by Ihering, as I shall state presently.

sists not only in the physical control, but also in the determination to exercise it on one's own behalf, is equally apparent, if we consider how possession is transferred. Suppose that you and I are living together in the same house; that you are the owner, and that I am a lodger. And suppose that you, being in want of money, sell the house to me; that you receive the money, and formally acknowledge me as the owner, agreeing to pay me a weekly sum for permission to continue to reside in the house. No external change whatever need have taken place in our relative position; we may continue to live on precisely as before; yet there can be no doubt that I am now in possession of the house, and that you are not ¹.

369. In order to constitute possession (in a legal sense) it is not necessary that the intention to possess should be constantly present to my mind. If I have once determined to exercise my physical control over a thing on my own behalf, and so completed my possession, it will be sufficient for the purpose of retaining possession, that I should, if I adverted to it, keep to that determination. Savigny seems to go further, and to think that, provided the physical control continues, the possession continues also unless I have adverted to it and changed my determination ². Whether this is so or not; whether it is necessary, in order to lose possession, that I should advert to it; or whether it is sufficient that, if

of possession by change of mind only.

Intention to possess need not be always present.

¹ In Pollock and Wright on Possession, p. 124, it is stated that 'a purse lost in the street, the owner knows not where, may in point of law still be in his possession.' Further on it is said, 'even bona vacantia for which no owner or possessor can be found are perhaps to be treated not as being in the possession of nobody, but as being in the possession of a person who cannot be ascertained. It is even doubted whether it is possible for a possessor to divest himself of his possession of a thing by wilful abandonment of it.' Of course, this involves a view of possession radically different from that taken in the text. It gets rid entirely of both the physical and mental elements, some combination of which is considered by most persons to constitute the legal conception of possession (see Pollock and Wright on Possession, pp. 11, 16).

² Sav. Poss. s. 32, p. 355.

I adverted to it, I should determine not to exercise that physical control any longer, or at least not on my own behalf, we need not further discuss : because in this, as in every other case, where we have to inquire into the state of mind of a person, we can only judge of it from external circumstances : and the external circumstances from which we should infer that *after* advertence a change of determination had taken place, are precisely those which *upon* advertence would render a change of determination likely. For instance, we infer that the gold digger has abandoned his possession of the quartz from which he has extracted the gold, because we know that he could have no further use for it, and men do not generally care to keep what is useless ; and we should draw the same inference, whether an actual determination to abandon is necessary or not. In many such cases we affirm that the possession is gone, without troubling ourselves with the inquiry when exactly it was parted with.

How
change of
mind as-
certained.

370. Questions however sometimes arise which render it necessary to determine with exactness the point of time when possession is lost ; and if the physical control does not pass at once into any other hands, this is frequently a question of no little difficulty. If indeed the party in possession chooses publicly to declare his intention to abandon it, the difficulty is then solved. But in the absence of such a declaration, we have not only to infer the change of mind from the surrounding circumstances, but also the date of that change. For instance, if the person who has been in possession of a piece of land neglects to cultivate it, or make any other use of it for some years, we may pretty safely infer that he has abandoned it. But if it is necessary to determine exactly when he abandoned it, we can hardly tell. He may have omitted to cultivate, in the first instance, from want of means, and may have abandoned his possession only when he finally discovered that to procure such means was hopeless : or from the experience of previous years he may have concluded that cultivation at present prices was unprofitable ; but may not

then have abandoned all hope of a better market. Thus, the date at which his determination to possess finally changed may have been considerably later than the first season for cultivation which he allowed to pass. In such a case, however, in the absence of all evidence to the contrary, it would be usual to take the date of the first indication of an intention to abandon—that is, of the first omission to cultivate—as the date of that determination, leaving it to those interested to establish any other date, if they could¹.

371². That a person can be in possession of a thing by his representative has never been doubted. But there has not been a complete agreement amongst jurists as to the nature of that possession. It has been frequently treated as a fictitious possession; but against this Savigny argues, and, it appears to me, successfully.

372. The error of treating possession through a representative as fictitious or constructive possession only is a branch of the error noted above, which treats corporal contact as

Possession
through
representative

is real
possession.

¹ I do not think an intention to abandon possession would ever be presumed from the mere inaction of the owner with regard to waste and valueless land or unworked mines. On the contrary, I think the owner would be considered as always in possession so long as there was no intrusion. This I take to be the true ground of the decision in the case of *Agency Company v. Short*, Law Reports, Appeal Cases, vol. xiii, p. 793, which has been much discussed both in Europe and America. There the question was as to the possession of a piece of waste and valueless land. If an owner gets out of possession, and the Statute of Limitations begins to run against him, it is difficult to see how it can cease to do so until he again gets into possession. But the Court in this case seems to have thought that, when the intruder went out and no one else went in, the owner was restored to possession without any act of ownership on his part. This, under the peculiar circumstances of the case, was a justifiable inference. It has no connexion with the legal doctrine of remitter.

² Sav. Poss. s. 26, p. 304. The idea of possession through another person varies somewhat with the relation between the parties. It is strongest (if I may use the expression) where the relation is that of master and slave; less strong where the relation is that of master and servant; but nevertheless stronger here than where the relation is that of ordinary principal and agent. The difference between theft by a servant, and criminal misappropriation, in the Indian Penal Code depends upon this variation. See ss. 381 and 405.

necessary to true possession. All that is necessary to my possession being the power to resume physical control, and the determination to exercise that control on my own behalf, it is clear that I possess the money in the pocket of my servant, or the farm in the hands of my bailiff, just as much as the rings on my finger, or the furniture of the house in which I live.

Subse-
quent as-
sent of
principal
sufficient.

373. This, however, presumes a representative who is obedient to my commands. In other words, whilst, in order to constitute possession of a thing through my representative, I must determine to exercise control over it on my own behalf, the representative must also determine to allow me to exercise that control. As soon as my representative determines to assume control on his own behalf, or to submit to the control of another than myself, my possession is gone. If there be any cases in which this rule does not apply, they are exceptions which the law has introduced to obviate the effects of fraud, or for some similar purpose; as in the case already discussed, where some one has intruded upon the property of an absent owner¹.

Possession
of infants
and luna-
ties.

374. It is not necessary, in order that the principal may get into possession, that he should have had his attention turned to the fact that his representative has brought the thing under his control. It will be sufficient that the representative has this control; that he means to exercise it, not for himself, but for his principal; and that in so doing, he acts within the scope of the authority conferred upon him. Probably also English lawyers would consider that, even if without my authority you assumed control over a thing on my behalf, and I subsequently assented to your act, I was in the same position as if the act had been done originally by my order. But my possession would not really commence till my assent was given.

Represent-
ative
must
assent.

375². It is desirable here to point out how the doctrines of representative possession are applied to such persons as

¹ *Supra*, s. 365.

² *Sav. Poss. s. 21, p. 248.*

infants and lunatics, whom the law considers as labouring under incapacity. The case of these persons appears at first sight to present considerable difficulties. It may be said that, as possession in the legal sense comprises a determination of the will, it follows that persons whom the law considers as incapable of making such determination—such as children under a certain age and lunatics—are incapable of acquiring possession; that, however completely they may have obtained physical control over a thing, they can have no possession in a legal sense; that it is (as the Roman lawyers expressively said) as if one were to put a thing into the hand of a person asleep¹. Nor can they acquire possession through the act of a representative; for the assent of the lunatic or infant as principal would still be necessary to complete it, and this the infant or lunatic is equally incompetent to give.

376. To solve this difficulty we must remember that the only representative of an infant is his parent or guardian, and that the only representative of a lunatic is his committee. Now the relation of the parent or guardian to the infant, and the relation of the committee to the lunatic who is intrusted to his care, is not the simple and ordinary relation of principal and representative—it is a very special one; and the primary feature of it is, that the representative here supplies the mental deficiency of the person whom he represents. His determination on behalf of his incapacitated principal has the same result as the determination of a principal of full capacity on behalf of himself. Hence it follows, that if the guardian, for instance, acquires the physical control over a thing, and determines to exercise that physical control on behalf of his ward, though it might be a straining of language to say that the ward was in possession, yet between the guardian and the ward, who are in a manner identified, there is one complete person who is in complete possession—which possession has pre-

¹ Dig. 41. 2. 1. 3.

cisely the same results for the benefit of the infant as the possession of a fully competent person. So too, where the ward himself obtains the physical control over the thing, the guardian can supply what is necessary to complete the possession. For the ward is under the control of the guardian, so that the guardian can determine that the control which his ward has obtained shall be exercised by the ward on his own behalf; and thus the possession is complete.

377. It is no doubt curious to find ideas presented in this somewhat inverted order—to find the representative acquiescing in the act of the principal, instead of the principal acquiescing in the act of the representative. And difficulties naturally arise out of this inversion in some cases. But many have been cut short by simply solving them in favour of the disabled persons.

Con-
ditions
necessary
for repre-
sentative
possession.

378. Reverting to the main subject of consideration, we see that, in order to constitute possession in a legal sense through a representative, three conditions must be fulfilled:—first, the representative must have the physical control over the thing; secondly, the representative must determine that this physical control shall be exercised on behalf of his principal; thirdly, the principal must assent to its being so exercised.

379. If either the representative has not the physical control over the thing, or if the principal does not assent to that physical control being exercised on his behalf, then the possession is gone. So too, if the representative changes his determination to hold the thing for his principal, and determines to hold it for himself, or for another, then, properly speaking, the possession is gone. But here again the law sometimes steps in to prevent the consequences of fraud. For instance, if the thing were land, and if the representative were simply to change his determination, from a determination to hold the land on behalf of his principal to a determination to hold it on behalf of himself, I think that in every system of

law the possession of the principal would be treated as uninterrupted—at least, until the denial of the principal's right, or some unequivocal act inconsistent with that right, had been brought to the knowledge of the principal. Such a case would be very closely analogous to that mentioned above; namely, where a man's land is taken possession of by a stranger in his absence, in which case he does not lose possession till he becomes aware of the intrusion ¹.

380 ². Derivative possession is the possession which one person has of the property of another. The physical control of a representative is sometimes called his possession; though, as we have seen, the legal possession in this case is in the principal. But derivative possession is true legal possession; the holder of the thing having the physical control over it coupled with the determination to exercise that physical control on behalf of himself. Derivative possession.

381. Hence, between the bare detention of a representative, which is not possession in a legal sense at all, and derivative possession, which is true legal possession, though detached from ownership, there can be no confusion. But there are many well-known legal relations, in which the transfer to one man of the physical control over the property of another forms an essential feature; and it is frequently a question to be determined, whether or no, subsequently to this transfer of the physical control, the possession is in the owner through the transferee as his representative, or whether the transferee holds it derivatively on behalf of himself. The relations in reference to which the question arises are very numerous; but it most frequently occurs in reference to the relation of principal and agent, of lender and borrower, of letter and hirer, of pledgor and pledgee, or of bailor and bailee. These are relations which constantly arise out of the commonest transactions in daily life. Distinction between it and representative possession.

382. The Roman lawyers would seem to have proceeded upon the principle that, where an owner transfers to another Under the Roman law.

¹ Supra, s. 365.

² Sav. Poss. s. 23, p. 282.

the physical control over a thing without the ownership, the transferee should hold the thing as a representative, and that the possession should remain in the owner in all cases, unless it was necessary for the enjoyment of the other rights which the transferee was to have, that he should have the right of possession also.

383. Nevertheless there has been very considerable contention, even under the Roman law, in reference to some of the relations enumerated above, as to where the possession is, after the physical control is transferred. Savigny thinks that under the Roman law in the case of the agent, the borrower, the hirer, and the bailee, the possession is never transferred; but that in the case of the pledgee it is. And he makes no distinction between land and moveables ¹.

Views of
Ihering.

384. The views of Savigny as to the mental element which he considers necessary to possession are rejected in toto by Ihering, who maintains that the only mental element necessary to possession is just so much as distinguishes it from mere accidental physical contact—the intention to retain it. Whoever has the physical control coupled (if I may use the expression) with this minimum of intention has the legal possession with all its consequences, unless there is some express rule of law which declares the contrary.

385. It is quite possible that Ihering's theory is, as he endeavours to prove, more consonant to the Roman law than that of Savigny. It would not be worth while to inquire into this, which (after all) is to us a matter of secondary importance. The question of primary importance to us is, which theory would lead to the best practical results? Ihering's conception of possession has the advantage of great simplicity, but the exceptional cases which the law would have to deal with would be numerous, and the experiment of setting forth these exceptions has not yet been tried.

386. The language of the English law upon the subject of

¹ Sav. Poss. s. 23, *passim*.

possession is not very clear. There are certainly some English judges who think that intention may be a necessary English law as to possession. element in the acquisition of possession¹: but very likely they had not, when they expressed that opinion, the arguments on the other side present to their minds. Still there can be no doubt that it is true to say that by the *animus* of the person who is in physical possession it is frequently determined whether or no that person is in legal possession also. Ihering seems to think that this is undesirable, but I doubt whether it could be got rid of: and, unless it can be got rid of, the language of Savigny seems to me to be appropriate.

387. Before the English law can be reduced to clearness and consistency on any theory of possession, it would I think be necessary to remodel to some extent the law itself. Some English law of possession as applied to larceny. points of English law appear to me to have got into inextricable confusion. This is particularly the case with the law of larceny. The gist of the offence of larceny is the taking possession of a thing dishonestly; and it required a good deal of ingenuity to establish that a man who took a thing innocently could by his subsequent conduct be chargeable with *taking* it with intent to steal it. One way of doing this has been to hold that if *A* delivers a thing to *B* with the intention on both sides that *B* should take possession of it, yet if both are mistaken as to the nature of the thing the possession does not pass until *B* discovers the mistake and then determines to retain it, which determination they hold to constitute a 'taking' dishonestly. This is not the opinion of all, but it is of a great many, English judges. It follows that if *A* were to make *B* a present of a picture by mistake, thinking it to be a Rubens, and *B* thought so too, and *B* were to keep the picture for twenty years, and were then to give it away without discovering the mistake, the picture would never have been in *B*'s possession at all: or if *A* handed to *B* a box which both supposed to contain plate, and it contained books, *B* would never, unless he opened the box, be in

¹ Wright and Pollock on Possession, p. 208.

possession of the books. Where, one would like to know, would the possession be if it were not in *B* ¹?

387 a. So far as the criminal law is concerned it would be easy to solve the difficulty. A man who receives as a gift a sovereign knowing that he was only intended to receive a shilling, or buys a chest of drawers with a bag of gold in it which he has good reason to believe the owner did not know to be there, clearly ought to be punished for appropriating the sovereign or the bag of gold, but not for larceny. The only rational way of meeting these cases, and I venture to say the only way in which they can ever be made intelligible to a jury, is by making the dishonest misappropriation of goods, the possession of which has been lawfully obtained, itself an offence. This is the law which has been adopted in the Indian Penal Code ², and it works admirably. It restricts at once the offence of theft or larceny to cases where there is a real outward and visible act of taking, such as no judge or jury can misunderstand.

As applied
to bailees.

388. As regards the pledgee of goods probably most English lawyers would agree that when the goods are delivered to him he is in legal possession. And in a recent work, where I believe for the first time the question has been generally discussed, the view taken is that whoever, otherwise than as a servant, receives a thing from another upon an undertaking to keep and return it or to apply it in accordance with the directions of that other, is a bailee, and as such is in legal possession of the thing ³. But there is very high authority against this view. Lord Justice Mellish in the case of *Ancona* against *Rogers* ⁴ says distinctly:—‘It seems to us that goods delivered to a bailee to keep for the bailor, such as a gentle-

¹ This follows from the cases of *Merry v. Green*, *Meeson and Welsby's Reports*, vol. 7, p. 623, and the judgment of seven judges in *Reg. v. Ashwell*, *Law Reports*, Queen's Bench Division, vol. 16, p. 190. See some very subtle reasoning on this subject in *Pollock and Wright on Possession*, p. 102.

² See sect. 403.

³ *Pollock and Wright, Poss.* pp. 131, 163.

⁴ Reported in *Law Reports*, Exchequer Division, p. 292.

man's plate delivered to his banker or his furniture warehoused at the Pantechnicon, would in a popular sense as well as in a legal sense be said to be still in his possession.' No doubt it was at one time settled law that a bailee did not commit larceny by a dishonest misappropriation of the goods, whereas a servant by the same act did commit that offence: and no doubt this distinction rests on the assumption that the bailee has, and that the servant has not, the legal possession. But the inference from these decisions is, as it seems to me, greatly weakened by the fact that this distinction has been swept away by an act of parliament; and that a bailee who dishonestly misappropriates the goods delivered to him is made guilty of larceny¹. Moreover there are certainly some cases in which a bailor can bring trespass for an injury done to his goods in the hands of his bailee, a position which it is very difficult to explain unless it be also held that the bailor is in possession². Further, a delivery by the seller to a carrier may be a delivery to the buyer, which it could hardly be unless this delivery puts the buyer in legal possession².

388 a. It is no doubt quite possible to draw a distinction between the case of moveables handed over to be held simply at the will of the owner and moveables handed over under conditions by which the owner is bound: and possibly the true view of the English law in regard to moveables may be that the owner remains in possession after delivery in the former case but not in the latter.

388 b. In the case of land it is even more difficult than in the case of moveables to seize the position of the English law, because in this case special inconveniences have been remedied by inconsistent methods. When land is let to a tenant for the ordinary purposes of occupation he can bring an action for any disturbance of his physical control over the land, not only

As applied
to land.

¹ Larceny Act, 1861.—On the other hand, it may be said that the Indian Penal Code makes a dishonest misappropriation by a bailee a separate offence, and not theft.

² Pollock and Wright on Possession, p. 145 and p. 71.

against strangers but against his own landlord. He also recovers the enjoyment of his physical control by a judgment precisely similar in form to that by which an owner in possession recovers. And the landlord is not nominally either plaintiff or defendant in any action relating to the possession whilst the land is let to a tenant. So far, then, it would seem clear that the tenant is in legal possession. But when we come to look at the landlord's position we find that for some purposes he also is considered to be in possession. True it is that we generally speak of the landlord being not possessed but seised, but this distinction is merely verbal, it being impossible to give any definition of seisin which would exclude possession, and we have to extricate ourselves from this difficulty; it being conceded on all hands that two persons cannot be at the same time in possession of the same thing¹.

389. The tendency of modern English lawyers is probably towards treating the tenant as in legal possession of the land, but there is one difficulty in the way of doing this which cannot be overlooked. Whilst giving the tenant the legal possession they do not shew any signs of abandoning the position that he has nevertheless no interest in the land. Now without saying that it is absolutely impossible it would be at least very strange, that a man should be in the entire and exclusive possession of land on his own behalf and should be in the enjoyment of all the fruits of it, and yet not be the owner of any interest in it whatsoever. This position is scarcely intelligible.

390. There are, as it seems to me, three methods of solving the difficulty. One is to treat the person physically in possession as tenant as a sort of bailiff for the owner, paying the owner a fixed sum out of the profits and retaining the remainder for his remuneration. There is no reason why the relation of landlord and tenant should not be of this character. A similar view has been taken of the position of the *colonus* in Rome, of the *pachter* in Germany, and, I believe, of the

¹ Pollock and Wright on Possession, p. 20.

bailleur in France : and it was certainly at one time the view taken in England. Another method is to consider the tenant as the owner and in legal possession not of the land but of some *jus in re* over the land, something in the nature of what Roman lawyers called a usufruct. A third method is to consider the landlord as in possession or seised not of the land but of the freehold—the freehold being some right in or over the land distinct from the land itself. The possession of the land itself being thus left vacant for the tenant ¹.

391. The term possession, as we have hitherto explained it, clearly assumes some tangible existing thing, over which the party in possession may exercise his physical control : but the Roman lawyers extended the idea of possession to abstractions ; to things which are not perceptible to the senses ; to incorporeal things, as they are usually called by lawyers.

Quasi possession of incorporeal things.

392. Possession, in a legal sense, as distinguished from the mere physical control or detention, does not rest upon a notion exclusively applicable to things corporeal. The notion upon which the legal idea of possession rests is that of making the simple exercise of this physical control a subject for legal consideration and protection, apart from ownership. But the simple exercise of any right may, it is obvious, be so considered and protected.

393. We must not conclude from this, that all that we have said about possession may be applied, without discrimination, to the exercise and enjoyment of any rights whatever. Many of the rules which govern the question of possession are founded on the existence of something which may be seen, felt, and handled, and it is only by a metaphor that these

To what things applicable.

¹ See Pollock and Wright on Possession, pp. 47, 49, where the third method seems to be adopted. But the adoption of any one of these methods would require an extensive revision of our legal phraseology. It may also be objected that the landlord has then only *jus in re alienâ*, because there is no suggestion that I know of that the landlord's ownership and possession are of different things. But this is not a real difficulty, because all rights over land are according to the theory of English law *jura in re alienâ*, the *alius* being the sovereign.

rules can be extended to a right which may be enjoyed. This is an easy metaphor when confined within certain limits; as, for example, when we speak of a person who enjoys the use of a pathway, or a watercourse running over the land of another, as being in possession of the way, or of the watercourse. But it would be at the least a bold metaphor to speak of a doctor in large practice as in possession (in a legal sense) of his practice.

394. The Roman lawyers contented themselves with extending the legal idea of possession to those rights which they denominated servitudes—a class of rights similar to, but more extensive than, that class of rights which we call easements. And they constructed for the protection of the enjoyment of rights of this class rules closely analogous to those for the protection of the physical control over things corporeal. Modern lawyers have attempted to give to the idea of possession a much wider extension; and this extension with us is somewhat indefinite. Thus by statute the possession of an advowson is expressly protected as distinguished from the title to it: so also a person collecting tolls has been treated as in legal possession of the right to take tolls: and it has been even suggested that we might treat a person collecting the interest of a debt as in possession of a debt.

395. Whether or no such an extension of the idea of possession is useful, this is not the place to consider. It is certain that the extension, if made at all, should be made with some circumspection. Care must be taken in each new application, not only that the nature of the subject is such that the idea of possession is capable of being analogically applied to it, but also that it is one to which the legal consequences of possession are suitable. To apply those consequences to the exercise of all rights, without discrimination, would produce the greatest confusion.

396. To whatever extent the idea of possession has been carried, the discussion of it has remained within the limits assigned by the Roman lawyers, namely, the possession of

things corporeal, and of servitudes. All, therefore, that we can say further on this subject, must be in connexion with the latter class of rights, which we shall hereafter consider¹.

397. It is a fundamental principle, which is obscured by language in ordinary use, but which must never be lost sight of, that only one person can be in possession of the same thing at the same time. This principle is easily deduced from what has been above stated as to the legal notion of possession. Possession, in a legal sense, is the determination to exercise physical control over a thing on one's own behalf, coupled with the capacity of doing so; and is, therefore, of necessity exclusive. Only one person in possession at a time.

398. This principle has, however, been obscured by the double meaning of the term possession. Possession sometimes means the physical control simply; the proper word for which is detention. And of course, one person may have the detention and another may have the possession in the legal sense of the term. Thus the money which is in the hands of my servant is under his immediate control, and in popular language is in his possession; but in a legal sense, inasmuch as that control will be exercised on my behalf exclusively, it is in my possession, and not in his.

399. A more difficult case is that of co-ownership. But the English law has expressed itself on this subject by a phrase which recognises in a very remarkable manner the distinction between possession in the sense of simple detention, and possession in a legal sense; and by so doing clears away, so far as co-owners are concerned, any difficulty as to the proposition which we are now considering. The rule of English law laid down by Littleton², and adopted by every succeeding lawyer up to the present time, is, that if there be two co-owners each is in possession of the whole and of the half. What this must mean is, that whereas each owner has access to, and control over every part of the property, and so may be said to have Possession of co-owners.

¹ See *infra*, chap. x.

² Sect. 288.

possession in the sense of detention of the whole, yet he exercises that control, not on behalf of himself alone, but partly on behalf of himself, in respect of his own share, and partly as representative of his co-owner, in respect of his co-owner's share. In contemplation of law, therefore, he is only in possession of his own share. However many co-owners there may be, each will in contemplation of law be exactly in the same position; that is to say, each will be in possession of his share.

CHAPTER X.

EASEMENTS AND PROFITS-A-PRENDRE.

400. The rights which I propose to consider in this chapter are those comparatively few out of the innumerable *jura in re* which exist over a thing upon which English lawyers have bestowed the names easements and profits-a-prendre. These rights are *jura in re*.

401. In most systems of law we find certain *jura in re* classed apart and specially treated. Thus in the Roman law certain *jura in re* are classed apart and are called *servitudes*. Servitudes. This is a metaphorical expression, at the bottom of which seems to lie the idea of a thing used by and placed under the control of a person who is not the owner of it. Between the owner of the thing and the person who has this right there is no direct legal relation: the control being not over the person of the owner, but over the thing: *res servit*, as the expression was.

402. In English law we have not the term 'servitude' but we have the idea. We call the thing over which the right exists the 'servient' thing. The continental nations of modern Europe have adopted the term 'servitude' or an equivalent one¹, and the law relating to *servitudes* is in those countries substantially the same as the Roman law.

¹ In German, 'Dienstbarkeit.'

403. Neither easements alone, nor profits-a-prendre alone, nor both taken together, correspond to the servitudes of the Roman law; the classification of *jura in re* with us, so far as it has proceeded, being different. But nevertheless the English law of easements and of profits-a-prendre has been, and still is, largely influenced by the Roman law. It will therefore, I think, be found useful, if I give a brief general description of the leading features of the Roman law ¹.

Positive
and nega-
tive servi-
tudes.

404. Servitudes under the Roman law were either positive or negative. A positive servitude is a right to do something on, in, or in respect of, a thing owned by another, which the owner, as such, might have done, and which no one else, except under special circumstances, might have done (*servitus quae in patiando consistit*). A negative servitude is a right to prevent the owner of a thing from doing something, which, as owner, he might have done if unrestrained (*servitus quae in non faciendo consistit*).

Servitudes
corre-
spond to a
duty to
forbear.

405. Both kinds of servitude correspond to a duty on the part of the owner to forbear. A positive servitude corresponds to a duty on the part of the owner to forbear to exercise his right of preventing an interference with his property. He must endure that interference (*patientia*). A negative servitude corresponds to a duty on the part of the owner to forbear to exercise some right of ownership. The right to compel a person to do an act in respect of a thing does not fall within the conception of servitude; and it has been doubted whether it was brought by Roman lawyers, as it has been by modern lawyers, within the conception of a *jus in re* ².

406. Servitudes were divided by the Roman lawyers into

¹ The authorities will mostly be found, briefly and conveniently stated, in Salkowski's *Lehrbuch der Institutionen*, 3rd ed., pp. 216 sqq. See also Sohm, *Institutes of Roman Law*, Ledie's translation, p. 258.

² Vangerow, *Lehrb. d. Pandekten*, § 338, Anm. 2, 1. The phrase of Roman law was that *servitus in faciendo non consistit*. As will appear later we have a thing, which we call a 'service': it is a *jus in re aliena*, and it consists in *faciendo*. See s. 430.

‘prædial’ and ‘personal.’ The conception of a personal servitude is simple enough. There is a person to whom the *jus in re alienâ* belongs, and a *res aliena* over which it is exercised. The conception of a prædial servitude is more complicated. Besides the *res aliena* over which the right is exercised, there is another *res* to which the right is attached. The owner of this second *res* is the person who enjoys the servitude: and the enjoyment of the servitude always accompanies the ownership of the second *res*, though it is, of course, not merged in it. The meaning of a right being attached to a thing, which is an expression we often meet with, is, I take it, that the enjoyment or exercise of the right follows the ownership of the thing to which the right is attached. In a prædial servitude each *res*, that over which the servitude is exercised, and that to which it is attached as a right, is a *prædium*, that is, a piece of land or a house.

Prædial
and
personal
servi-
tudes.

407. It is not inconceivable that a servitude should exist the burden of which is attached to one *res* and the benefit to another without the additional circumstance that each *res* is either land or a house. But, as far as I am aware, no such servitude was known to the Roman law.

Servitudes
not attach-
ed to move-
ables.

408. Probably the origin of prædial servitudes is to be found in the gradual introduction of the stricter notions of exclusive ownership. Without some modifications of these notions neighbours could not have lived comfortably together. Hence in prædial servitudes it is always assumed that the two *prædia* are not far apart. Hence also it was a rule that the right of a landowner over the land of his neighbour must not only be advantageous to him, but advantageous to him *quâ* landowner, or, as it is sometimes put, advantageous to his land. So again it followed that, if the landowner who had the right sold the land for the benefit of which the right existed, he could not himself retain the right. It passed with the land to each successive owner of the land. Exactly in the same way, if the land over

Origin of
servitudes.

which the right was exercised were sold, the land remained burdened with the servitude, following out the idea that the servitude was attached to both lands, to one as a benefit, and to the other as a burden.

409. The land or house to which the servitude was attached as a benefit was called the *locus superior*; that to which it was attached as a burden was called the *locus inferior*.

Perpetua
causa of
prædial
servi-
tudes.

410. It was a rule that prædial servitudes must have what was called a *perpetua causa*, and this rule appears to have been applied with considerable strictness. Thus, if there was a hole in the wall of a house to let off water used in washing the floor, through which the water escaped on to the neighbouring land, there could not be a prædial servitude to receive the water carried through such a hole. But there might be a prædial servitude to carry off the rain water through a hole of this description. This reason is thus given:—‘*Neque enim perpetuam causam habet quod manu fit; at quod ex caelo cadit, et si non assidue fit ex naturali tamen causa fit; et ideo perpetuo fieri existimatur*¹.’ So the right to take water from a lake or a pond could not be prædial servitude². But these rights might exist as personal servitudes.

Vicinity of
prædia to
which ser-
vitudes are
attached.

411. It was not necessary that the dominant prædium and the servient prædium should actually touch. But it follows from what has been said that the two prædia must have been near, as otherwise the servitude would be useless to the dominant prædium.

Prædial
servitude
must be
useful.

412. A prædial servitude could exist only so far as it was actually useful in respect of the land to which it was attached. Thus a man might have a prædial servitude to dig clay in his neighbour's land in order to make vessels to hold the wine which he made on his own land; but he could not have a prædial servitude to dig clay in order to make vessels for sale³.

¹ Dig. viii. 2. 23.

² Ib.

³ Dig. viii. 3. 6.

413. A prædial servitude must always be exercised with as little injury as possible to the servient prædium. Must be carefully exercised.

414. A prædial servitude could only be exercised by the owner of the dominant land, or by his servants and family on his behalf. Even the mere temporary right to enjoy it could not be conferred upon another. Could not be transferred.

415. Prædial servitudes were classed into urban and rural, according as the servient prædium consisted of buildings or land. All buildings were called prædia urbana, whether they were situate in town or country ¹. Urban and rural servitudes.

416. Any jus in re attached to land or buildings both as a burden and as a benefit was, as I understand the law, called a prædial servitude, and subject to the restrictions I have stated. It can be easily understood that, owing to these restrictions, prædial servitudes were not very numerous or common. The most common prædial servitudes of the rural class were rights of way, rights to take water, rights to convey water, and rights to water cattle. We also meet with the right of pasturing cattle, the right to dig and burn lime, the right to dig sand, and the right to cut wood. But always with the limitation that the servitude must be of such a nature as to contribute continuously to the enjoyment of a neighbouring tenement. Restricted number of prædial servitudes.

417. Personal servitudes were not subject to the same restrictions. Any use that could be made of a thing either moveable or immoveable, or any right to take its produce, could be made into a personal servitude. But there was this important restriction, that no personal servitude could last longer than the life of the person in whose favour it was created, or, in the case of a juristical person, longer than one hundred years. Personal servitudes.

418. I will now endeavour to describe and to distinguish easements and profits-a-prendre. These are both jura in re Easements and profits-a-prendre

¹ Just. Inst. II, 3. 1. This classification is not very clear, but it is not very important. It seems only to have been applied to the oldest and best known servitudes.

attached to land. alienâ, and in both the servient res must be land, or a building attached to land, or water standing or flowing on land, all which English lawyers call by the name of land. A *jus in re alienâ* may exist where the servient res is not land, but such a right would not be either an easement or a *profit-a-prendre*.

Difference between easements and profits-a-prendre. **419.** An easement is a right to do something on, in, or in respect of the servient land, or to prevent the owner of the land from doing something on, in, or in respect of his own land. A *profit-a-prendre* is a right to take something from the servient land. This is a cardinal distinction. There cannot be an easement to take something from the servient land.

Why these *jura in re* are separately classed. **420.** The only object, as far as I am aware, of taking one set of *jura in re*, classing them apart, and calling them easements, and taking another set of *jura in re*, classing them apart, and calling them profits-a-prendre, is in order to regulate their acquisition. Easements might be described as *jura in re* which can be acquired by one set of methods; profits-a-prendre as *jura in re* which can be acquired by another set of methods. Then there are other *jura in re* which are neither easements nor profits-a-prendre, and which can only be acquired by a third set of methods; whilst some *jura in re* cannot be acquired at all. When therefore it is said that there cannot be an easement to dig clay in your neighbour's land, all we mean is that you cannot acquire that right in the ways in which easements are acquired; but there still may be a *profit-a-prendre* of that description: that is, the right may be acquired in an appropriate manner.

Easements appurtenant and in gross. **421.** There are two kinds of easements known to the English law. The first and commonest kind are those in which both the benefit and the burden are attached to land; such, for example, as the right of the owners of Blackacre to cross the neighbouring field Whiteacre; or the right of the owners of a house on one side of a street to prevent the owners of land on the opposite side from building so high as to darken their windows. These are what Roman lawyers would call

prædial servitudes. We call them easements appurtenant. The second and rarer kind of easements are those where the benefit is enjoyed by the inhabitants of a particular district or persons carrying on a particular trade; such, for example, as the right of the inhabitants of a village to dance in a particular close; or for licensed victuallers to erect booths on the waste of a manor during a fair. These are called easements by custom, because it is only by custom that they can be claimed¹.

422. A right to take potwater, that is, to take water for domestic use from a running stream, is an easement and may be claimed by custom. It might be thought that it was a profit-a-prendre, but it is not so considered; the reason assigned being that flowing water, like air, is in motion; it is now here and now there, and for this reason is not considered as in the ownership of the person on whose land for the moment it happens to be. This is supposed to distinguish it from a profit-a-prendre².

423. What the Roman lawyers expressed by the word 'prædial' as opposed to 'personal,' English lawyers express by the word 'appurtenant': and what the Roman lawyers expressed by the word 'personal,' English lawyers express by the words 'in gross.' There can be no easement in gross in the English law except by custom. In other words, an easement must be claimed by a man either as owner of a certain piece of land, or as inhabitant of a particular locality, or as carrying on a particular trade.

¹ Writers on the law of easements seem a little doubtful whether they ought not to call this second class of easements by the name of 'customs,' and exclude them from easements altogether. As the only object of the classification of jura in re is to determine the mode of acquisition, and as these easements can only be acquired by custom, it would, perhaps, be better to exclude them.

² *Race v. Ward*, Ellis and Blackburn's Reports, vol. iv. p. 702. But the water taken is in the possession of the landowner: and I am not sure that in all profits-a-prendre the thing taken is the servient owner's property. Thus a right to take fish in a running stream is certainly not an easement, and it seems to be considered as a profit-a-prendre. *Peers v. Lucy*, Modern Reports, vol. iv. p. 363; see Goddard on Easements, p. 7.

Easement
without
profit.

424. It is not unfrequently said that an easement must be without profit. This cannot mean that the easement must be valueless, for that would be nonsense. On the contrary, unless the easement were advantageous to the dominant tenement it could not be maintained. It means that the easement must not include the taking of anything away, for then it would be profit-a-prendre and not an easement. The requirement that the easement must render the enjoyment of the dominant tenement more advantageous certainly exists.

Perpetua
causa of
easements.

425. There is no direct authority that an easement must have a perpetua causa, though it seems to be suggested that some such restriction exists ¹.

Right of
support.

426. The right to support, as it is called, that is, the right of one neighbour to prevent another digging away his soil so as to let down the soil of the adjoining land, is one that has been much discussed lately. It can hardly be doubted that such a right may exist both in respect of land which has been built on, and in respect of land which has not been built on. The hotly contested question, therefore, whether or no it should be called an easement, resolves itself into a question as to how such a right can be acquired: it being supposed that there are certain modes of acquisition which are applicable to it if it is an easement, but not otherwise ².

¹ The more recent editions of Gale's work on Easements (p. 14) seem to suggest this. Bracton, whom Gale quotes, would be no authority upon such a point, as he puts down a good deal of Roman Law which was never adopted. The case of *Arkwright v. Gell*, Meeson and Welsby's Reports, vol. v. p. 203, has no connexion with the Roman law doctrine of perpetua causa, though, in so far as it lays down that an easement cannot be acquired in a temporary watercourse, it leads to an analogous result.

² See the case of *Angus v. Dalton*, Law Reports, Appeal Cases, vol. vi. p. 740. The word 'easement' is used in the Prescription Act, but the right of support is not specifically mentioned. The question whether it is a positive or negative easement is of importance, because the evidence that the enjoyment is 'as of right' is very different for positive and negative easements. *Infra*, chap. xiii. It is difficult to say exactly what the judges in the above case severally understood by 'positive,' or, as they prefer to call it, 'affirmative,' and 'negative' easements. But

427. Any right attached to land as a burden and also as a benefit, which is recognised by law, and which is not a profit-a-prendre, would, I think, be called an easement. There cannot be many such rights, but the list of them is not perhaps yet complete. The last one recognised was the right of the owner of an inn to place a signboard on a neighbouring house¹.

428. Profits-a-prendre may (as I have said) be either appurtenant or in gross: but if the profit-a-prendre be appurtenant it can only exist so far as it is advantageous to the enjoyment of the dominant tenement to which it is appurtenant².

429. There does not seem to be any express authority as to how far it is possible to create rights in the nature of a profit-a-prendre under English law. The multiplication of rights of this nature is looked upon as undesirable, but their creation does not seem to have been expressly restricted³.

430. Both in an easement and in a profit-a-prendre the owner of the servient tenement has simply to forbear: to forbear, that is, from exercising his ordinary right as owner of excluding others from his land, and disposing of it in accordance with his wishes. But because neither an easement in the English law, nor a servitude in the Roman law, can consist in compelling the owner of the servient tenement to do something, it must not be supposed that a jus in re

according to the definition I have given above (sect. 404) I should say that both the Lords Justices, Lindley and Bowen, consider the right of support to be negative, though they think that where the land has been built upon so as to increase the burden that might have been treated as an actionable wrong, and if so the right of support would have become positive in that case. See pp. 763, 784, 793, of the Report.

¹ See the case of *Moody v. Steggles*, Law Reports, Chancery Division, vol. xii. p. 261. See some curious rights enumerated in *Goddard on Easements*, p. 74.

² See the case of *Bailey v. Stephens*, Common Bench, New Series, vol. xii. p. 91.

³ See the observations of Mr. Justice Willes in the case of *Bailey v. Stephens*, at p. 111 of the Common Bench Reports, New Series, vol. xii.

of this nature cannot exist. What is called a fee farm rent is a *jus in re alienâ* to compel the owner of the *res* to pay a certain sum of money at fixed intervals to the person to whom the fee farm rent belongs. This is what English lawyers call a 'service.'

CHAPTER XI.

SECURITY.

431. One of the most ordinary results of the various transactions into which people are daily entering is that they fall under legal obligations of various kinds. For many reasons the performance of these obligations is more or less insecure; sometimes the debtor is obstinate; sometimes he is careless; sometimes he is positively unable to do what he ought.

432. I have spoken here of the debtor. That word is generally used by English lawyers to signify a person who owes money to another; I shall use it to signify any person who owes a service to another which is capable of being represented in money¹; and I shall use the word creditor to express any person to whom such a service is due.

¹ The expression by which Professor Kuntze in the portion of his work of which I have made such extensive use below, indicates the kind of demand for which security may be given is 'die künftige Leistung eines Vermögenswerthes.' I am not sure that I have used an expression exactly equivalent to this: but it is clear that only demands which could be satisfied by a money payment, or at any rate only demands so far as they could be satisfied by a money payment, could have been in the learned author's contemplation, because he speaks of a real security as being, in all cases, ultimately attained. Security may be given for any demand, but a real security will only produce money or a money value. (See *infra*, sect. 447.)

Meaning
of term
'security.'

433. I shall also use the word security to express any transaction between the debtor and creditor by which the performance of such a service is secured. Unless this liberty of choosing my own expressions were conceded to me, I could not attain even a reasonable degree of conciseness and precision in the discussion of this subject.

English
law of
security
derived
from
Roman.

434. It has been often said that the English law of security is derived from the Roman; and it is certainly true that whenever questions of difficulty have arisen upon this subject, English lawyers have almost invariably looked to the Roman law for assistance.

Not from
the best
sources.

435. Unfortunately, instead of applying to the best sources of information, the Digest or the Code itself, or even availing themselves of the labours of the best modern commentators, English lawyers have placed themselves completely under the dominion of Story. I am not sufficiently acquainted with Story's writings to venture to appreciate exactly the value of his authority on general subjects. In questions of Roman law he appears to rely chiefly upon Domat and Pothier; which would be like relying in chemistry on Lavoisier and Priestley. The labours of these great men have been long ago eclipsed by later discoveries. As to the Roman law of pledge, at any rate, Story's knowledge appears to me to be incomplete¹.

Advan-
tages of
a compre-
hensive
knowledge
of the Ro-
man law.

436. It is perfectly clear that if we are to rely upon the Roman law for assistance at all, we must try to comprehend its principles according to their latest and fullest interpretation. I have, therefore, given here a short general statement of the Roman law of security borrowed from the work of a learned living author²; and I believe it will serve to give the student a good general grasp of the principles upon which

¹ Story on Bailments, sects. 286, 290 a. He was perhaps puzzled, like Pothier, by what appeared to be irreconcilable statements in the Roman law.

² *Cursus des Römischen Rechts, Lehrbuch für den Akademischen Gebrauch*, von Dr. Johannes Emil Kuntze. Leipzig, 1869. See also Sohm's *Institutes of Roman Law*, Ledie's translation, § 59.

this portion of the law must always be administered, whatever diversity there may be in particular rules. I also think that it is well worthy of study, not only as illustrating and explaining our own law, but as a striking combination of plain good sense with scientific accuracy of expression. I know nothing in jurisprudence more sound, more forcible, or more acute.

437. From the earliest times the Roman creditor never seems to have thought of relying solely on the good faith or ability of his debtor for the satisfaction of his demand. By the *nexum*, the oldest form of contract, the debtor was handed over bodily to the creditor, becoming, in fact, his slave; and it was no easy matter for the debtor to escape from his obligation. Upon entering into the *nexum* he had to procure six fellow-citizens as witnesses to, and assistants in the formalities of the transaction. This gave strength and precision to the obligation. But the presence of these witnesses was in later times further utilised in a way which ultimately led to a great advance in the law. By means of the other ancient form of contract, the *sponsio*, it was easy to secure the concurrent engagement of these six persons, in addition to that of the principal debtor, that the obligation should be performed; so that, in case of the failure of the latter, the creditor might have recourse to them.

438. It will be observed that the creditor was thus to some extent secured not only against the unwillingness but against the inability of his debtor. Still the prevailing idea was that of pressure brought to bear upon the will of the contracting party; of some inconvenience to be suffered if the engagement were not fulfilled; and this was quite consonant to the spirit of the old Roman law. But it did not long suffice for all the wants of a busy practical people. What was wanted by creditors was a tangible means of obtaining satisfaction for their claims wholly independent of the will of the debtor. This was actually obtained, though

Earliest
form of
security.

Entirely
personal.

Creditors
want real
security.

only after a very long struggle. The creditor at length got what is called *real* security; that is to say, he got, not only the promise of the debtor and a means of compelling him to fulfil that promise, but he also got a right over a specific thing which ensured to him the performance of the promise, quite independently of the wishes or ability of the debtor; so that at last not only the will of the debtor, but even the debtor himself was so little regarded that, in the latest period, it almost seemed as if the thing which was made security was treated as the debtor, and not the original party to the obligation. The progress of the Roman law from a simple pressure upon the will of the debtor to this its ultimate development is in the highest degree interesting.

Fiducia. 439. The first advance upon the *nexum* and *sponsio* was the transaction called *fiducia*. This was a formal proceeding, suitable to any case in which it was desired to transfer to another a specific thing under conditions. It therefore was not confined to the taking of security, but was also used in cases of deposit or loan. Ultimately, however, it came specially to signify the taking of security.

A complete transfer of the property.

440. In the transaction of *fiducia* the various conditions upon which the thing was to be returned were defined by the contract under which it was transferred. If it was a case in which security was to be given, the creditor got the debtor to make over to him the full ownership of the thing, binding himself to return it as soon as the obligation was fulfilled. This was an easy and effectual way of obtaining security, and it remained in use even after the introduction of the other modes which will be hereafter described; indeed, it was well known to the western world, at least in Italy, up to the time of the Christian Emperors. It was, in fact, a proceeding similar to an English mortgage, but without a power of sale or foreclosure.

This not always convenient.

441. There were, however, many things which were in every way suitable to be used as security for the performance of an obligation, but to which, on account of certain well-

known difficulties, the proceeding by way of fiducia was inapplicable¹. I need not enter at length into the nature of these difficulties; they were no doubt technical, but were too deeply rooted to be swept away for a special purpose without destroying the symmetry (*elegantia*) of the law, and thus causing confusion. The Roman lawyers, therefore, introduced another proceeding called *pignus*, the effect of *Pignus*, which was to get rid of the transfer of ownership altogether, and to substitute for it a transfer to the creditor of the bare possession, of course under the same condition as to its return, when the debt was satisfied.

442. In both these processes, however, there were inherent defects. In the case of fiducia the debtor was dependent on the good faith of the creditor for the restoration of his property, for if the creditor had parted with it, the debtor had only a personal remedy against him; on the other hand, the creditor could not consistently with his contract obtain any material satisfaction out of the thing transferred to him, which was, perhaps, not even in his possession. So, in the case of *pignus*, the creditor was exposed to the risk of the property being sold by the debtor to a third person in fraud of his security; in which case, if the thing pledged were land, the creditor was wholly unprotected against this third person's claim². Indeed this defect was so serious that, until it was removed, land was very rarely given in *pignus*. The *pignus* too, like *fiducia*, produced no material satisfaction

Defects
of both
fiducia
and *pignus*.

¹ Either a *mancipatio* or an *in jure cessio* seems to have been necessary to bring back the property, and I should suppose also to convey it, in the first instance, to the creditor. See Smith's *Dict. Antiqq.*, s.v. *Fiducia*.

² It was this inapplicability of *pignus* in its original form to land, combined with the false etymology of the term (*a pugno*), which led to the saying that *pignus* properly (*proprie*) could only be given of moveable property. This has misled Story (*Bailments*, sect. 286), who translates *proprie* 'generally,' and seems to think that the distinction between *pignus* and *hypotheca* was a fundamental one, though occasionally lost sight of: the truth being that it was one of little importance and very rarely noticed. In later times a *pignus* in which the possession was not transferred, and a *pignus* of land, were everyday transactions.

of the claim, but only a pressure upon the will of the debtor, arising from the inconvenience of being kept out of his property. So far, therefore, the law was still under the dominion of the idea that it was the will of the debtor which was to be acted upon.

Security
required
by land-
owners
from their
cultiva-
tors.
Latifun-
dia.

443. The most important improvements in the Roman law of security were not introduced until, by the extension of the Roman dominion beyond the confines of Italy, very large estates first became common. From this time large numbers of slaves and even of free persons¹ began to be employed in cultivating these properties. Small estates also were sometimes let out to farm. Hence the necessity that the landlord should have some security for his rent became apparent at Rome, as in all places where the land of one person is cultivated by another.

They
could not
obtain it
under the
old law.

444. Under the old law it was not easy for the landlord to obtain this security from the cultivator. Generally the only property which the cultivator had was his farming stock (*inreeta et illata*); and it was obvious that this could neither be assigned to the landlord by a *fiducia*, nor given into his custody by a *pignus*. It was therefore necessary to devise some other means of effecting security; and the mode adopted was, to allow the tenant by a simple agreement, without any formalities, to pledge his farming stock to his landlord as a security for the rent. The validity of such an agreement was first recognised by a praetor of the name of *Salvius*, who thus led the way to the most important changes in the law of security. The property of the tenant could be followed, if it had been removed by him off the farm in fraud of his agreement with his landlord. At first, however, this could only be done within very short periods of time after the removal. If the property were still in the hands of the

Origin of
hypo-
theca.

¹ This is Prof. Kuntze's statement. Sir Henry Maine is of opinion that there were no free cultivators (Ancient Law, first ed., p. 299). But see Plin. Ep. iii. 19; and for an account of the *colonus* see Kuntze, Excursus, p. 299, and Schm's Institutes of Roman Law (Ledlie's translation), p. 115.

tenant, the landlord could have it brought back within the year. If it had passed into the hands of a third person, then it could not be pursued, if the latter had held it either for a year, or, at least, for as long a time as it had been upon the land of the tenant. This strict rule of limitation, however, was considered to make the security too perilous; and another praetor, named Servius, removed this limitation, and gave to the landlord the ordinary time to sue for and recover the thing alienated.

445. These provisions did not long remain confined to the claims of landowners. The Servian action, by which the thing pledged could be followed into the hands of any person to whom it came, was extended to all kinds of property, and to security for all kinds of claims. Thus an entirely new kind of right was created, a *jus in re alienâ* available against the world at large: and this right could be acquired by means of a simple agreement without any special formality.

446. This form of security was called by the Greek name *hypotheca*, and it was probably of Greek origin, being copied by the Romans from the Greeks of southern Italy, where they had become familiar with it. It was only a development of the original *pignus*, although it was at the same time a very considerable advance upon it; and the Roman law did not henceforth keep up any distinction between *pignus* and *hypotheca*. Whether the possession was actually transferred or not, the agreement by one man that his property should be a security to another was in later times called indifferently *hypotheca* or *pignus*. Of Greek origin.

447. Still we have not reached the point aimed at. Though the creditor had what has been called a real right, but which is better called a *jus in re*¹, he had no real security. Identified subsequently with *pignus*.
Did not originally give a real security.

¹ The term 'real right' to English ears generally means a right to in or over land, as opposed to a right to in or over chattels which is called a 'personal right.' That is the reason why the expression is objectionable. Where chattels are given as a security there is no suitable expression for the right of the pledgee over the goods pledged, and we are compelled to adopt the expression *jus in re*.

Power of
sale.

He could assert that the thing pledged to him remained subject to the pledge wherever it happened to be, but he had no means in his own hands of satisfying his claim if the debtor neglected to do what he ought. This had yet to be provided for, and the mode of doing so was suggested by an ancient rule of the Roman law, that in the case of lands pledged to the state (*praedia*), the state could sell the property and satisfy its own debt. It became customary for private creditors to stipulate for a similar right; and this right of sale, coupled with the rights conferred by the *pignus*, or hypotheca, gave to the creditor the means of satisfying his claim, and rendered him entirely independent of the debtor. It was necessary at first for the creditor to obtain the right of sale by a special concession, but in later times it was always presumed to exist. Indeed, the law went even a step further. A positive agreement by the creditor not to sell had only the effect of rendering three several notices to the debtor necessary, instead of the single one which would otherwise suffice.

Extended
to fiducia.

448. These were the steps by which the law was developed in the case of *pignus* and hypotheca. In the case of *fiducia* the result was the same, though the method of arriving at it was different; there the ownership was already transferred to the creditor; and the most obvious course in the case of the debtor's failure was by express agreement to make the creditor's ownership absolute. Indeed, this could at one time be done. But as soon as the right of the creditor to sell and satisfy the debt was fully established in the case of *pignus*, the same right was attributed to the creditor in the case of *fiducia*; and thenceforth the clause of forfeiture¹ or foreclosure fell into disuse, a sale by the creditor being in every respect more in accordance with the spirit of the law

¹ This clause in the agreement was called *lex commissoria*. It was declared by Constantine to be illegal; Smith's *Diet. Antiqq.* s. v. *Pignus*. But the creditor might still agree to purchase at a fair price. See Windscheid, *Lehrbuch des Pandekten-Rechts*, sect. 238.

as administered under the Christian Emperors than a foreclosure.

449. Henceforth the right to sell and satisfy the debt (*distractio*) came to be considered as the very essence of the law of security. The person in whose favour the security was given always had this right; and therefore, as a pledge might in all cases result in a sale, nothing could be pledged which could not be sold. Subject to this, however, everything which we should call property might be given as a security; any beneficial right to the use or enjoyment of land, and even easements might be so dealt with; the only test appearing to be whether it was possible for the creditor to extract from the thing pledged satisfaction of his demand. Debts due to the debtor could be given as a security; the creditor being able to obtain satisfaction by causing payment to be made to himself, or by selling the debt to a third person.

450. So too a creditor could give the thing pledged as a security for a debt of his own; but subject, of course, to the rights of the original pledgee. If therefore the original debt was paid off, the second pledgee lost his security; but he could prevent this by giving to the original creditor a proper notice.

451. I pass over the rules which relate to the constitution of several pledges for one demand, and successive pledges of the same thing for several demands, and I proceed now to state more particularly the nature of a security under the Roman law, and the position of the debtor and creditor after it has been given.

452. The particular nature of the obligation of which the performance was to be secured was immaterial, and a security might be given for the whole of a debt or for a part. It was also of no consequence whether the debtor himself gave the security, or some one else for him¹. A pledge

¹ There was, of course, the limitation above referred to (sect. 432 note) that the security could only produce money to the creditor in satisfaction of his claim.

might even be given for a claim which could not be enforced by law, such as a mere debt of honour, or a moral duty. A security also, like an obligation, could be conditional or future.

Owner-
ship not
altered by
pledge.

453. Giving a thing in pledge did not prevent the owner from dealing with it as he thought proper, provided that he did not interfere with, or lessen, the security of his creditor. Any dealings which would have that effect were null and void as against the purchaser from the creditor, should the latter exercise his right of sale. But in the case of moveable property the pledgor was not allowed to alienate it without the consent of the pledgee; the alienation was not absolutely void, but the pledgor was personally liable as for a misappropriation, and of course such a sale did not displace the creditor's security.

Use and
profits be-
long to
pledgor.

454. The use and profits of a thing given as security belonged entirely to the pledgor, unless it were expressly agreed to the contrary. If the pledgee were in possession, then he was bound to make as good a profit as he could out of everything from which his debtor had made a profit, being responsible for not doing so. It was only where there was a loan of money, and no agreement at all about interest, that the creditor in possession of a security could take the profits himself, and then he could do so only to the extent of a moderate rate of interest; of course he could not take them if interest had been expressly excluded. Sometimes the parties expressly agreed that the whole profits should be taken in lieu of interest, and this was allowed.

Tacking.

455. The Roman law recognised to some extent the principle of what English lawyers call 'tacking.' If the creditor had any other claims for money in writing against the debtor, he could retain possession of the security, notwithstanding that the debt for which it had been originally given was satisfied, whether these other claims were created before or after the security was given. But, as far as I am aware, the unjust rule of English law, that the first creditor has a priority

over a subsequent pledgee even in respect of unsecured debts, was never adopted ¹.

456. Of course the right to sell the thing pledged and satisfy the debt was the most important of all the rights of a secured creditor. This right could not be exercised until the debt was actually due and notice had been given to pay it. The sale was conducted by the creditor, who was looked upon as an agent of the debtor. Not that agency is, strictly speaking, the legal ground of the transaction; the creditor, when selling, acted in his own right; but the creditor was so far an agent that he had specific duties to perform in order to protect the interests of the debtor when the security was brought to sale. For instance, it was his duty to advertise the sale, and to give notice to the debtor when and where it would take place, so that the latter might know exactly what was being done, and might interfere if necessary. This notice was quite distinct from the notice to pay the debt prior to the exercise of the right of sale. And though the conduct of the sale was left to the creditor, he was bound in all things to consult the interests of the debtor as far as possible. If no suitable purchaser could be found, then the creditor could ask that the thing given as security might be adjudged to belong to himself; but in such a case it could still be redeemed by the debtor at any time within a year. The only other case in which the creditor could obtain the ownership absolutely for himself was where there had been an express stipulation that, if the debt were not paid, the creditor should become the absolute owner (whilst such an arrangement was allowed ²), or by an agreement to purchase at a fair price.

457. It was the duty of the creditor to get in the money from the purchaser, and after paying himself to hand over

Power of
sale how
exercised.

Creditor
could
claim for
deficiency.

¹ The whole doctrine of tacking seems very questionable. There has been an attempt in England to get rid of it, but it has failed. See Coote on Mortgages, 4th ed., p. 827.

² See *supra*, sect. 448, note.

the surplus to the debtor. Of course if there was not sufficient to discharge the debt, the balance remained due.

Involuntary
pledges.

458. A pledge might be created either voluntarily or involuntarily. A voluntary pledge might be created by contract, or by will; an involuntary pledge might be created either by express order of court, or be attributed by the law as an incident of certain transactions.

Only one
kind of
security.

459. I do not propose to state at length the particular modes in which a security was created by contract, by will, by operation of law, or by the order of court. I would only note that the Roman law had this great practical convenience, that there were general rules applicable to all kinds of security alike by whatsoever means created. There was no difficulty about this, the general object and character of the transaction being the same throughout; and it conduced greatly to brevity, clearness, and precision of the law that this should be so.

General
pledges.

460. A security was not necessarily restricted to a single thing, but there might be a pledge of several things, and even a general pledge of all a man's property. But here an important distinction must be borne in mind. A general pledge of all a man's property is not a pledge of his property viewed as a whole (*universitas*); for then the debts due by him would be included; but it is a pledge of each several thing now belonging or hereafter to belong to the debtor.

Extinction
of
pledges.

461. The following are the principal methods by which a security came to an end: (1) when the pledgee became the owner of the property given in pledge; (2) when it was agreed that the property should be released; (3) when a third person had held the property honestly as his own for twenty years; (4) when the obligation, the performance of which was to be secured, was discharged; (5) when the pledgee exercised his right of sale.

When not
extinguished.

462. No one can have a right of any kind over his own property except the general right of ownership. If, therefore, I am owner of property I cannot hold that property

as security. But I may have this right:—that if any one else who has a security over it endeavours to satisfy his claim, he shall leave something for me. This is a right which is sometimes called a right of security, and the Roman law gave such a right to the owner in some cases. It gave it, for example, to a person who having already a first charge bought the property himself. It thus enabled him to protect himself against the claims of subsequent security holders¹.

463. How to settle the claims of several creditors, each holding security upon the same property and each claiming to exercise his rights, has always been a problem of some difficulty. The Roman lawyers acted almost exclusively upon the principle that the creditor earliest in point of time had the prior right, and they justified this by their view of the nature of the right of the pledgee, namely, that it was a right *in rem*, or real right—a right like ownership available against all the world, which no subsequent dealing to which the pledgee was not a party could invalidate or impair. No regard was paid to the mode in which the pledge had been acquired, nor did it make any difference that another creditor had obtained possession; as a rule the date alone was looked to.

464. There were, however, exceptions to this rule. Thus when money had been advanced for the express purpose of preserving a thing from destruction, the lender could claim a priority; as, for instance, in the case of a bond for money advanced to equip or repair a ship on a bottomry bond as we should call it². The claims of the state for public dues had also a preference over those of private persons.

Exception
to rule of
priority by
date.

¹ It is interesting to compare the English doctrine as to letting in subsequent incumbrances. See Coote on Mortgages, 4th ed., p. 645; also Vangerow, Lehrbuch der Pandekten, sect. 392; Windscheid, Lehrbuch d. Pandekten-Rechts, sect. 248, 4.

² This priority was founded on what was called an *in rem versio*, and was an application of the general principle that one person ought not to be enriched at the expense of another. Windscheid, Lehrbuch des Pandekten-Rechts, sect. 246.

Right of
subse-
quent
pledgees.

465. The rights of a subsequent pledgee were the same as those of any other secured creditor, subject only to the rights of the pledgees who preceded him. He could bring the property to sale, and could even compel a prior pledgee to do so. He had also the special right to pay off any prior creditor and take his place; and if the prior creditor refused to take the money, he might deposit it in Court. If the first pledgee sold the property, and the produce was more than sufficient to pay his debt, the next pledgee could claim to be paid out of the surplus.

English
law of
security.

466. Having thus stated shortly the Roman law of security, I proceed to consider the English law: and, first, as it is administered in the Courts of Common Law.

Distinc-
tion
between
pledge and
lien.

467. The law is here certainly in a backward condition. These courts can hardly be said to possess any method of giving security over immoveable property, and as to moveable property the law appears to me to be somewhere about in the same state of development as the Roman law at the time of the First Punic War. The common lawyers insist very strongly that possession is necessary to create the security, and upon the difference between a pledge and a lien. They consider a lien as a mere personal right of detention which gives the creditor no means of satisfying his debt, but only produces a pressure upon the will of the creditor, arising from the inconvenience of being kept out of his property; whereas (they say) a pledge is something more. The cases are not very explicit as to the distinction, but I gather that a pledge is constituted by adding to a lien the permission to the creditor in case of default to sell and satisfy the debt. It is not however altogether clear when this right of sale exists and when it does not.

Unauthor-
ised sale.

468. It is easy to understand that creditors, dissatisfied with a dry right of detention which is very often burdensome, frequently attempt to sell the property pledged; and no subject has vexed English judges more than the question,

what remedy a debtor has for a wrongful, a premature, or an unauthorised sale by a creditor of the property which he holds as security. The knot has been partly cut by the Factors' Acts: but it is a question which still frequently arises where these acts do not apply. It is now pretty well settled that the debtor can only recover such actual damage as he may have suffered; and no one can complain of the injustice of the result thus arrived at. But I confess that I do not understand a good deal of the reasoning on which this opinion is based, and I think that some advantage may be gained by examining it. It is in these cases particularly that so much learning and ingenuity have been expended in establishing that the creditor got not only a lien but a pledge, that is, not a right of detention only of the article pledged, but also a right to sell and apply the proceeds in satisfaction of the debt under the conditions of the contract; *which right*, they say, gives the creditor a 'specific interest or property' in the article, that is to say, a *jus in re* ^{Pledgee has a real right.} ¹.

469. Now it is no doubt perfectly true that the pledgee has a 'specific interest or property' in the thing pledged in the nature of a *jus in re*; but what one is at a loss to see is, in what way that depends upon his having also a power of sale. ^{This does not depend on power of sale.} Still less is it easy to perceive how the nature of the creditor's interest can determine the question, to what remedy the debtor is entitled in case of an unauthorised or wrongful sale. This, as the learned judges elsewhere point out in the cases to which I refer, depends upon the contract between the parties, and the effect which is produced by a violation of its terms by one of them ².

470. I cannot therefore exactly see, why this discussion

¹ Law Reports, Queen's Bench, vol. i. p. 612. See Austin, Lectures, pp. 990, 992, 3rd ed. I may here observe that what Mr. Justice Shee quotes (at p. 603) as Domat's opinion upon the Roman law is really a statement of the French law, differing in this respect, as Domat points out, from the Roman law.

² Law Reports, Queen's Bench, vol. i. pp. 600, 615, 619; id. Exchequer, vol. iii. p. 301.

True
nature of
the real
right.

about the pledgee having a real right is introduced. I am disposed however to think that there has been some misunderstanding as to the true nature of a real right, or *jus in re*, which the judges are so desirous to attribute to a pledgee¹. A *jus in re* is, as we know, a right over a specific thing available generally against all persons, as distinguished from a personal right in respect of the same thing which is available against an individual or individuals only; it is therefore a *jus in rem* as distinguished from a *jus in personam*. Ownership, for example, is a real right, and it is in fact the sum of all real rights, as explained above². The particular kind of real right which the courts were dealing with in the above cases was not the right of an owner, but the right of one person over a thing owned by another; the right of the creditor in some manner to deal with the debtor's property; a right in kind just like an easement. But whether the pledgee has or has not such a right is wholly unconnected with the right to sell.

Difference
between
real right
and real
security.

471. Possibly what the learned judges were thinking of was, in truth, not a real *right* but a real *security*. What constitutes a real security has already been explained³: it is the means of getting satisfaction out of a specific thing independently of the will or ability of the debtor. This comprehends a *jus in re*, or real right, but also a great deal more; and it is perfectly true that the essence of a real security is the power of sale. But then it must be borne in mind that the possession by the creditor of a power of sale, and his ability to exercise it, in no way affects or is affected by the nature of his interest in the article pledged. This power of sale when exercised operates, not upon the interest of the creditor, but upon that of the debtor, according to a principle perfectly familiar to any English lawyer.

¹ I may observe that in the case in the Queen's Bench, Mr. Justice Shee, whilst he agrees with Mr. Justice Blackburn, that the pledgee has a real right, comes to a directly opposite decision upon the case before him.

² *Supra*, sect. 309.

³ *Supra*, sect. 447.

472. The law of security has been far more satisfactorily dealt with by the Courts of Chancery, at least in reference to lands. This portion of the law of England bears a considerable resemblance both in its history and in its ultimate condition to the Roman law, and seems to be, like the latter, the combined result of clear legal ideas and practical business habits. Pledge of lands in courts of chancery.

473. The class of securities with which the Courts of Chancery are specially concerned are called mortgages. I need not here explain at length the nature of a mortgage, as it stood before the Courts of Chancery undertook to modify the rights of the parties, and as it stands now in a Court of Common Law. It is an absolute conveyance, with a condition that, if the money be paid by a certain day, the property is to be restored to the owner. If that day is allowed to pass, the ownership of the mortgagor becomes absolute¹. At this low point in the development of the law of security, so far as it related to lands, the Courts of Common Law seem to have stuck fast. Mortgage.

474. In stating the law as applied to landed security in the Courts of Chancery, I wish for the moment to divert attention from the history and course of development of the English law of mortgage, and also to get rid of the terms which the Court of Chancery frequently finds itself compelled to employ because it is cramped by the form of the instrument and the peculiar basis of its jurisdiction. Stated in ordinary language, the law is now as follows:—The transaction of mortgage creates a debt by deed under seal secured by the pledge of lands². The debtor remains the owner of the property, and may deal with it in any way he thinks proper, provided he does not lessen or impair the security of the creditor. The creditor, whether in or out of possession of the land pledged, has the right to his security and nothing more. If the creditor takes possession Present law of mortgage.

¹ It is somewhat similar to the original *fiducia* : *supra*, sect. 440.

² Coote on Mortgages, 4th ed., p. 1.

Mortgagee
can always
sell.

he is accountable to the debtor for his management of the property, and for his receipts. The creditor who has a mortgage has a real security; that is, he may, in case the debtor fails to do so, satisfy his own debt by selling the land pledged. The power to sell and satisfy the debt is frequently given by express contract, but even if not given by contract it is given by law¹. The concurrence of the debtor in the sale is immaterial; but six months' notice must be given before the power is exercised. The creditor, unless restricted by the contract, may sell privately or by public auction; in one lot or in parcels; but not in undivided shares. And though the conduct of the sale is left entirely to the creditor, he must not adopt any mode of selling which would be clearly depreciatory. He is in fact a fiduciary vendor, and must use all reasonable diligence to obtain a fair price. But his power to sell, if unrestricted by contract, cannot be interfered with, even though his conduct be harsh and oppressive: the only course to stay the sale is actually to tender the principal, interest, and costs².

Chancery
law of
mortgage
might be
extended.

475. Why these clear and sensible rules should have been confined to the Courts of Chancery one is at a loss to conceive; and why Courts of Common Law should have been shut out, or should have shut themselves out, from all jurisdiction over landed security it is also difficult to say³.

Lord
Mansfield
attempted
to extend
it.

476. There has been one attempt at a complete revolution of the ideas of a mortgage security prevailing in the English Courts of Common Law, made by a judge who was fearless of innovation, and to whose hands innovation might have been safely trusted. The question arose in this way.

¹ 23 & 24 Vict. chap. 145, sect. 11; Dart, Vendors and Purchasers, 4th ed., p. 48.

² Dart, Vendors and Purchasers, pp. 60, 63.

³ The recent changes by which all Courts have received jurisdiction to do complete justice in every case will lamentably fail of their object unless the common law doctrines as to mortgages are completely eradicated; and surely it is unnecessary that the old clumsy forms should be retained.

A person having a leasehold interest in land assigned it to another by way of security, in the usual form of a mortgage of land. Of course, in strict law, this was an absolute assignment, and the assignee became liable to the lessor upon the covenants in the lease. In an action, however, by the lessor against the assignee of the lease, upon a covenant contained in the lease, judgment was unanimously given for the defendant by the Court of Queen's Bench, consisting of Lord Mansfield and Justices Willes, Ashurst, and Buller. Lord Mansfield argued that in order 'to do justice between men it is necessary to understand things as they really are, and to construe instruments according to the intention of the parties.' He therefore refused to treat the mortgage as if it was in reality (what it no doubt was in form) a complete assignment of the lessee's interest, and considered it as a mere security¹. Had these views been adhered to, there can be little doubt that the position of mortgagor and mortgagee in Courts of Common Law would have been in a great measure, if not entirely, assimilated to their position in the Court of Chancery. It is perhaps, therefore, not surprising that they were firmly opposed by Lord Mansfield's very conservative successor, Lord Kenyon², who seems to have treated Lord Mansfield's opinion and those of the other judges who concurred with him almost with contempt, and declared that he would over-rule the decision of his predecessor 'without the least reluctance'³.

477. I can scarcely say why, but even Courts of Chancery have sometimes shown something of the same timidity as is shown by Courts of Common Law, when they have had to deal with security over property other than land. If goods be mortgaged exactly in the same form as land is usually mortgaged, the mortgagee's rights are not considered to be

Defeated
by Lord
Kenyon.

Holder of
security on
moveables
cannot
always
sell.

¹ See the case of Eaton against Jaques in Douglas' Reports, p. 455.

² Coote on Mortgages, 3rd ed., p. 120. This learned author was also evidently alarmed at what he calls Lord Mansfield's 'equitable innovations.'

³ Coote on Mortgages, ubi supra.

so full and complete¹: and when a security has been established in the nature of a *lien*, Courts of Chancery have not ventured any more than Courts of Common Law to give effect to the security by permitting a sale. In a recent case, where the Court of Chancery was pressed to exercise its jurisdiction by directing a sale, Lord Hatherley (then Vice-Chancellor) expressed his opinion that it would be dangerous to do so².

Bare right
of deten-
tion often
useless to
creditor.

478. There are still, therefore, many cases in which the creditor has a bare right of detention, and can neither by his own right, nor by the assistance of any court, obtain any satisfaction of his claim if his debtor is obstinate, however beneficial to all parties a sale might be. Thus a vendor of goods may before delivery retain, and in some cases may even after delivery retake, possession of them, and hold them as a security for the unpaid price; but he cannot sell them; and so this detention may continue till the goods become valueless, when the creditor will have lost his security and the debtor his property³.

Burn
against
Curvalho.

479. There are however cases in which this narrow conception of the law of security as applied to moveable property appears to be dropped without hesitation, and the widest possible validity is given to arrangements made by debtors for giving to creditors security for their claims. I do not know upon what distinction this change of view proceeds. Of course every variety of right may be created by agreement, but the difference in the agreement in some of these cases is very slight, and I suspect a good deal more depends on the inclination of the court when determining the in-

¹ Dart, Vend. and Purch. p. 48, 4th ed.

² See the case of The Thames Iron Works Company against The Patent Derrick Company, Law Journal Reports, Chancery, vol. xxix. p. 714.

³ If the remarks of such able and experienced lawyers as Lord Blackburn and Mr. Benjamin upon the rights of the unpaid vendor be considered, it will be apparent that my observations upon the unsatisfactory condition of the English law are neither presumptuous nor unfounded. See Blackburn on Sale, pp. 320 sqq.; Benjamin on Sale of Personal Property, book v. chap. iii.

tention of the parties, than on the exact words. In the case before Lord Hatherley above referred to¹ the debtor actually agreed with his creditor, who had already a lien or bare right of detention, that the property should at some future time be mortgaged for the claim with a power of sale. There the creditor was helpless. Yet in another case², where there was nothing but a promise by the debtor at a future time to 'hand over' to his creditor property of an amount equivalent to the debt, it was held by Lord Cottenham that this promise alone gave the creditor a right to have the property applied to liquidate and satisfy his debt. This is a decision which has been since frequently followed, and the incidents of the transaction, as well as the effect which was so readily given to it, are worthy of remark. In this case nothing was specified; the promise related to 'any property' in the hands of the debtor's correspondent abroad; the nature and value of the property were wholly unknown; the amount of the debt due was also wholly unknown, it being probable that the debt had been partly paid; the right was considered to be created by the promise to the creditor alone (the Lord Chancellor says so expressly in his judgment³) before it had been even communicated to the debtor's correspondent. But what is most important is the result. The mere promise to transfer the goods to the hands of the creditor was considered to create, not merely a right to hold them until the debt was paid, but a right to apply them at once, and without any formality or delay, in satisfaction of the debt: the creditor, as soon as he got possession, which he did not do until after his debtor had become bankrupt, sold the goods without further notice or ceremony, charging all expenses incurred upon his debtor.

¹ *Supra*, sect. 477.

² This is the well-known case of *Burn against Carvalho*, reported in the fourth volume of *Mylne and Craig's Reports*, p. 690. The same case had previously been before a Court of Common Law, and an opposite view taken. See the report in *Adolphus and Ellis*, vol. i. p. 883.

³ See p. 703 of the report.

Compared
with other
decisions.

480. I do not at all suggest that this decision was erroneous. Experience has shown that the principle on which it proceeds is (commercially speaking) convenient, and there is no legal difficulty whatsoever in carrying it out. But there is certainly to my mind a difficulty in seeing so great a difference between the agreement in this case and that in the case before Lord Hatherley, as to lead to such totally different results.

481. From this account of the English law of security it is apparent that no clear, consistent, and comprehensive statement of principles can be made with regard to it. At any rate this has never yet been done. On the other hand, no difficulty is found in preparing such a statement of the law of security either as it existed under the Roman Empire, or as it now exists in countries where the Roman law has been adopted with a real and comprehensive knowledge of what that law was, and the principles upon which it was based¹. I think therefore that there can be no escape from the conclusion that the faults of the English law are due, not to its connexion with the Roman law, but to the imperfect manner in which the Roman law has been understood. I have therefore, borrowing the results of the labours of others, given a pretty full statement of the Roman law, from which I think it will be seen that the principles recognised are not altogether different from the principles of our own law, but they are fewer, simpler, and more consistently followed.

¹ See, for instance, the *Allgemeines Landrecht für die Preussischen Staaten*, Part I. tit. 20. sections 1 and 2. This composition is not to be compared for clearness and precision with some portions of the more recent *Allgemeine Deutsche Handelsgesetzbuch*, yet it is incomparably better than anything to be found on the subject of pledge in the English language: and although it is in many parts tediously minute, the subject only occupies forty-six octavo pages.

CHAPTER XII.

ACQUISITION OF OWNERSHIP.

482. THE acquisition of ownership may take place either in respect of a thing which had no previous owner, or in respect of a thing which had a previous owner. If the thing had a previous owner, then the ownership of one person is transferred to another. If it had not a previous owner, then a new ownership is created¹. Acquisition original or as transfer.

483. If a thing be without an owner, and be at the same time not in the possession of any one, it becomes the property of any one who takes possession of it, if he chooses that it should so become. This method of acquisition is called 'occupancy.' But there is in English law-books very little upon the subject of occupancy, for the reason that except fish in the sea there is very little to which it can be applied. Fish in a river and wild animals on land are considered to be in the possession of the person upon whose land they happen to be, and when killed or captured they belong to the landowner and not to the captor². Occupancy of a res nullius.

¹ It does not seem impossible to analyse every transfer of ownership into the extinction of the ownership of the transferor and the creation of a new ownership in the transferee, but I do not think it would tend to simplicity to do so: on the contrary, the idea of transfer carries with it the idea that the incidents of ownership are not changed, which is an idea we wish generally to preserve.

² This question has been warmly contested in France and Germany.

Origin of
ownership
not simple
occu-
pancy.

484. The real interest which attaches to acquisition of ownership by occupancy of a *res nullius* is not in connexion with its modern application, which is rare, but in connexion with the origin of ownership. Until recently it was almost always assumed that the acquisition of ownership by occupancy was so simple, so obvious, and so universal, as to be deemed natural, and that it was, in fact, the original mode of acquiring all ownership. That assumption is not now accepted. Nevertheless occupancy and ownership are historically connected, and the history of that connexion is not without its importance in modern controversies ¹.

Finding of
lost pro-
perty.

485. The finder of a thing which has an owner, but an unknown owner, cannot acquire ownership by merely taking possession of it, for it is not a *res nullius*. He may, however, if it is not in the possession of any one, take possession of it, and by lapse of time he may acquire the ownership like any other possessor. In some countries, where the owner does not at once come forward to claim the lost property, it is transferred by a special law to the state, or to the principal officer of justice, or to the church; and this sometimes with, and sometimes without a share to the finder. In England it is only the Crown, or its grantee, which has ever asserted a claim to property lost by the owner, and this only in respect of wreck, waifs, and estrays. But the right, even to this extent, is now rarely asserted ².

See Dalloz, *Répertoire*, s. v. *Chasse*, art. 172; Wächter, *Pandekten*, § 134, and Beil. 1. As to the English law, see *supra*, sect. 361 note.

¹ Some interesting observations upon the relation of occupancy to ownership will be found in the 8th chapter of Sir Henry Maine's *Ancient Law*. We find an example of occupancy without ownership in the (so-called) *Institutes of Manu*. The ownership of cultivated land (as distinguished from the homestead and the pasture immediately attached thereto) is not mentioned in that work; and as there are no rules as to how such land is to be disposed of when the family breaks up, it seems clear that when that book was written it was not owned, but only occupied.

² See Blackst. *Comm.* vol. i. p. 299; Code Civ. art. 717, and the observations of Marcadé in his edition of the Code; Dernburg, *Lehrb. d. Preuss. Pr. R.* vol. i. § 232.

486. The Crown has, by an ancient statute called *Prærogativa Regis* of uncertain date, the ownership of whales and sturgeons taken in the sea or within the realm. The right is still sometimes claimed in respect of whales by the grantees of the Crown. Whales and sturgeons.

487. Treasure trove is not strictly speaking a *res nullius*. Treasure trove. It is property which once had an owner, and which has been hidden (not abandoned or lost) by him; and on its being discovered it will be considered as treasure trove if all hope of tracing the owner is lost. If hidden in a place which is itself owned, as in a house or a field, it would, according to English principles, be in the possession of that owner; but it does not belong either to that person or to the finder. It belongs to the Crown, and it is an offence not to give notice of its discovery.

488. The acquisition of treasure trove has always been governed by special rules. By the Roman law half was given to the owner of the spot where it was found, and half to the finder¹. This is the rule which generally prevails on the continent of Europe².

489. If a tree bears fruit, or a domestic animal bears offspring, the produce in each case belongs to the same person as the tree or animal, unless it has been parted with. Produce of trees and animals. This has been called 'acquisition by accession.'

490. The transfer of ownership by what is called alluvion and diluvion is of considerable importance in those countries Alluvion and Diluvion. where the magnitude and violence of the rivers cause a great shifting of the soil, and frequent changes in the course of the stream. In England disturbances of this kind are rare, and, so far as they occur at all, generally occur in tidal rivers and in creeks and arms of the sea. The open sea also sometimes advances or recedes.

491. The shore of the open sea—that is, the strip of land between high and low water mark which we commonly call

¹ Just. Inst. ii. 1. 39; Wächter, Pand. § 134, Beil. 2.

² Code Civ. art. 716; Dernburg, Lehrb. d. Preuss. Pr. R. vol. i. § 233.

the sea-shore—is vested in the Crown or its grantee. And it makes no difference where this strip of land is situate. If the sea advances, this strip of land advances also, and is taken from the adjoining estate. If the sea recedes, there will be a space which is not sea-shore, as it is never covered by water. To whom does this space belong? Lord Hale seems to think that this depends on whether the sea has simply receded, or whether the sea is shut out, as it were, ‘by the casting up and adding sand and stubb to the adjoining land’: and he seems to assume that the former would be a sudden, and the latter a gradual process. If the sea were gradually shut out, he considers that the owner of the adjoining estate would gain the newly formed strip by accretion. If the dry land were formed by the sea receding, he considers that it would belong to the Crown, as it did whilst it was covered with water. Blackstone makes the whole question depend on the gradual or sudden nature of the change, giving the newly formed land to the Crown in the latter case and to the adjoining owner in the former¹.

492. The margins of creeks and arms of the sea *intra fauces terrae*, and of tidal rivers between high and low water mark, as well as the beds of such creeks, arms, and rivers, belong to the Crown, or to its grantee; and this ownership shifts as the water advances or recedes; that is to say, the margin and beds of these creeks, arms, and rivers will belong to the Crown, whatever their local limits may be at any one time. As to any land between the adjoining estate and the water which may be left by the receding or shutting out of the water, I imagine that the same rules would be applied as in the case of the receding or shutting out of the open sea.

493. The beds of inland rivers belong to the adjoining proprietors, and it is doubtful whether any change in the flow of the river, causing dry land to appear in one place and disappear in another, does, as a general rule, cause any change

¹ See Hale *de Jure Maris*, cap. vi, and Blackst. Comm. vol. ii. p. 262.

in ownership¹. The root of this doubt appears to be, that where the land is not *res nullius*, then the ownership of it cannot depend on whether or no it happens to be covered with water. This was certainly so in the Roman law; and the doctrine of acquisition of ownership by alluvion and diluvion, as developed in that law, depended on the principle that the beds of rivers were not owned by any one. The acquisition, therefore, was an acquisition of a *res nullius*. But in every case where there is acquisition of land in England, the thing, though possibly not owned exactly in the sense that private property is owned, is certainly not a *res nullius*. The acquisition of land, therefore, by alluvion and diluvion, if not excluded altogether, must depend with us, not on the acquisition of a *res nullius* by occupancy, but upon some other principle. Lord Hale seems to have perceived this, and tries to put it on some special ground which is not clear². It is better to admit at once that it is a special transfer of ownership ensuing upon some physical change: nor is there any doubt that such a transfer does take place for which no other account can be given; as, for example, when by the advance of the sea private land becomes sea-shore, and is transferred to the Crown.

494. There is one large tidal river in England, the Severn, in which, or at least in one part of which, the rule is that the manors on either side are bounded one against the other by

¹ See the case of *Foster versus Wright*, in *Law Reports, Common Pleas Div.*, vol. iv. p. 447; and that of the Attorney General *versus Chambers*, reported in *De Gex and Jones' Reports*, vol. iv. p. 55. Also the observations of the Privy Council in *Lopez versus Muddun Thakoor*, *Moore's Indian Appeals*, vol. xiii. p. 467.

² See the passage in *Hargrave's Tracts*, vol. i. p. 31. He says, 'If the soil of the sea which is covered with water be the king's, it cannot become the subject's because the water has left it. But in the case of *alluvio maris* [i.e. gradual deposit] it is otherwise; because the accession and the addition of the land by the sea to the dry land gradually is a kind of *perquisite*, and an accession to the land.' But these observations, even if they amount to anything, would apply only to the surface. And I very much doubt whether Lord Hale's distinction between the sea receding and being shut out by gradual deposit is a sound one.

the medium filum aquae, or central line of the stream : so that the boundaries are shifted if the river in any way changes its course¹. This also appears to be the rule in America, where the boundary between two estates is a fresh-water river, the soil of which belongs to the adjoining proprietors²: and a similar rule is found in some parts of India³.

Confusion. **495.** If the goods (moveable property) of one man become mixed with the goods of another the ownership may become thereby changed, and the rules applicable to such a case have occasioned some discussion. But in England the question is not of much importance, because the English law by the action of trover provides means by which a person whose goods have been mixed with those of another person can recover compensation for the loss of his property (which is probably all he wants) without entering into the question of whose the goods are subsequently to the mixture having been made. Consequently, if I take another man's goods and mix them with my own, I am liable to pay for the value of the goods, and damages for their detention. As soon as the judgment is satisfied, the ownership of the mixture is wholly in the defendant⁴. The very nice question as to the ownership of the mixture before the action could hardly arise in England; and it has not been discussed.

Quidquid
plantatur
solo solo
cedit.

496. English lawyers generally take it for granted that when the moveable property of one man is attached to the land of another it is at once transferred to the landowner, who sweeps off everything. This somewhat ruthless doctrine is based upon the maxim, 'quidquid plantatur solo solo cedit.' This, or something like this, is to be found in the Roman law, but it was not applied in the unqualified manner in which English lawyers apply it. For example, under the Roman law the materials of a building did not become the property of the person on whose land the building was placed, but

¹ Hale de Jure Maris, cap. vi. at p. 35 of vol. i. of Hargrave's Tracts.

² Kent's Comm. vol. iii. p. 428.

³ See Reg. xi. of 1825, sect. 2.

⁴ Infra, sect. 505.

remained the property of the builder. This, though it seems to us rather clumsy, must have operated as a practical qualification of the rights of the landowner, probably forcing him to make some compensation. So too the right, so tardily recognised by us, of the lessee to be compensated for his improvements, was distinctly recognised by the Roman law¹.

497. The French law gives whatever is affixed to the soil to the landowner, but then it also makes some careful provisions in favour of the party who thereby loses his property, upon the just principle '*neminem cum detrimento alterius locupletari*'².

498. The German law does not appear to recognise the rule *quidquid plantatur solo solo cedit* as a universal one. Thus, if a man builds upon the land of another, whether he does so *bonâ fide* or not, the building always belongs to the builder, and the owner of the soil has three courses open to him. He can either acquire the building by paying for it; or he can compel the owner of the building to pay for the land on which it stands; or he can insist upon the building being removed. But this only in case the landowner did not know of the building, or knew it and forbade it. If he knew of the construction and did not interfere, the land passes to the builder, who pays to the owner its value³.

499. Sometimes a man is deprived of his property as Forfeiture. a punishment for an offence: that is, his property is transferred to the Crown. This is called forfeiture, and is of some

¹ '*Id quod in solo tuo aedificatum est, quod in eadem causa manet, jure ad te pertinet. Si vero fuerit dissolutum, ejus materia ad pristinum dominum redit, sive bona fide sive mala aedificium exstructum sit.*' Code Just. ii. 32. 2; see Just. Inst. ii. 1. 29. The position of the *mala fide* builder has, however, been doubted; see Vangerow, *Lehrb. d. Pandek.* § 329; and see also Dig. vi. i. 59. The words of the Digest as to a lessee are remarkable: '*in conducto fundo, si conductor, sua opera aliquid necessario vel utiliter auxerit, vel aedificaverit, vel instituerit, cum id non convenisset, ad recipienda ea quae impendit ex conducto cum domino fundi experiri potest.*' Dig. xix. 2, 55.

² Code Civ. art. 555. See Marcadé, *ad loc.*

³ Preuss. Allg. L. R. i. 9, 327; Dernburg, *Lehrb. d. Preuss. R. R.* i. 236.

importance in connexion with the criminal law. So too there is a kind of forfeiture where property is held upon some condition, which not being satisfied, the property is forfeited. Such conditions may be created by the declared intention of the parties interested.

Bankruptcy. 500. When a man becomes bankrupt his property is transferred to trustees to be turned into money and distributed amongst his creditors. This is a topic of much importance in connexion with the law of bankruptcy.

Execution. 501. Property is not unfrequently transferred from one person to another by judicial process. This may be done directly by a decree of the court, or by a seizure and sale of the property. Though the transaction may take the form of a sale, there is no true contract, and no real sale in the ordinary sense of the term.

Succession. 502. There is a transfer of ownership which takes place at the death of the owner, and which is of vast importance. This I shall consider in a future chapter.

Prescription. 503. Long possession of property by a person who is not the owner may have the effect of transferring ownership, upon a principle which is called prescription, and this also I shall consider presently.

How far ownership of moveables follows possession. 504. Quite independently however of the transfer of ownership which takes place in consequence of long possession by prescription, there is in the case of moveable property a transfer of ownership which takes place merely, if I might say so, by reason of the refusal of the law to follow moveables from one hand to another, and of the ease with which ownership in the case of moveables is presumed from possession. This I will now consider.

Difference between moveables and immoveables. 505. The position of a person who has lost possession of moveable property is essentially different from the position of a person who has lost possession of immoveable property. A person who has lost possession of immoveable property may after a considerable lapse of time lose his ownership, which ownership another person may have acquired by pre-

scription. But until this time has passed the owner of immoveable property has ample remedies provided him for following his property wherever he may find it, and for recovering it in specie. This the owner of moveables can very rarely do. As a general rule, whatever may be the form of action in which he proceeds, and even if his ownership be established, he can only recover the value at which the property is assessed, and not the property itself, although the defendant is able to give it up. The result of the payment of the value, or of the levy of that amount in execution, or other satisfaction of the judgment, is that the ownership is divested from the plaintiff and transferred to the party in possession, and the case is likened to that of an involuntary sale. Of course, if the plaintiff himself chooses to take the value of the goods instead of the goods it is reasonable that he should be understood to have parted with his property. But it is peculiar that he should be compelled to do so. Possibly the reason of this may be that there is a great advantage to the plaintiff in suing in a form of action which enables him to recover damages instead of the property. He need not then prove that the defendant is still in possession of the property.

Owner of moveables cannot recover them in specie.

Transfer of ownership by recovery of value.

506. Whether the plaintiff will be allowed as an exceptional case to have judgment for a return of the property with the process necessary to compel it, is decided by the court after considering whether the property is of such a nature as that damages or its value will not be a sufficient satisfaction. This, however, is rather a matter for the plaintiff's own decision, and the law would be much simplified if the plaintiff were left to choose whether he would sue for the property or for its value¹.

507. But besides the transfer of the ownership of moveables which takes place when compensation is recovered for their

Transfer of ownership by

¹ The most recent case on the subject is that of *Ex parte Drake*, in Law Reports, Chancery Division, vol. v. p. 866, which however proceeds entirely upon authority, and contains no elucidation of the legal principle applicable to the case.

mere
change of
possession.

loss, there are still to be found traces of a notion, once widely prevalent, that in the case of moveables the ownership always followed the possession. The origin of this view, like the origin of nearly all views of law which proceed upon a distinction between moveables and immoveables, must be sought, not in the Roman law, but in the law of Germany. The Roman law protected by the same procedure the ownership both of moveables and immoveables. It is a characteristic of the early German law that whilst the ownership of land was almost indestructible, the ownership of moveables had only a very precarious protection.

Early
German
law.

508. The old German law expressed this view as to moveables in the maxims 'Hand muss Hand wahren,' and 'Wo man seinen Glauben gelassen hat, muss man ihn wieder finden.' The meaning of these maxims, and the exact state of the law which they represented in the remote times when they were applicable, are too much disputed for me to venture on any exact explanation of them. In a general way it may be said that they indicated that when a man parted with the possession of goods he must himself provide means for their recovery. He could not, merely relying upon his previous ownership, put forward a claim against any person who happened to be in possession of them. Against the person to whom he entrusted them he might have a personal action, if the circumstances were such that any obligation to restore the goods existed.

There was one exception to this which seems to be as old as the maxims themselves. If the goods had been taken from the owner by violence they might be retaken by him.

Develop-
ment of
law of
ownership
of move-
ables.

509. In modern times the protection of moveable property has extended everywhere considerably beyond these limits. An historical inquiry into the development of it would be extremely interesting. It seems to have proceeded upon two lines: first, the personal action for the restoration of the goods seems to have been extended so as to be maintainable under

certain circumstances against persons who were not included in the undertaking to restore; secondly, the exceptional right to retake possession of the goods seems to have been made exercisable in a larger number of cases, and to have been used as a foundation of proceedings for an inquiry into the ownership.

510. Perhaps the nearest approach to the early German law which can be found in modern times is in the maxim adopted in the French Civil Code, '*en fait de meubles possession vaut titre*¹.' Its only exceptions are where the property has been stolen from or lost by the owner. In the modern French law also we still see in a modified form the ancient process by which a person asserted his ownership, namely, by actual seizure. When under the French law such an assertion is allowed, the first step still is, under the authority and with the assistance of the court, to seize the goods claimed, and after that is done, then the contest as to the ownership is continued before the court².

Modern
French
law.

511. The action for the recovery of the goods based upon a personal obligation to restore them is in English law represented by the action of detinue. It is true that the action of detinue is not now restricted to cases where such an obligation exists: it is equally applicable to all cases in which one party is wrongfully in possession of the goods of another. But the notion still lingers that the action of detinue is founded on a contract, that is, a contract to redeliver the goods³, and Blackstone thought that it was a necessary condition to the action that the defendant came lawfully into possession of the goods⁴. The proceeding by which a person

Action of
detinue.

¹ Code Civ. art. 2279.

² Co. Proc. Civ. art. 826; Pothier, Œuvres, vol. x. p. 240, ed. Bugnet. The process is called *saisie vindication*. It follows very closely our proceedings in *replevin*.

³ See the case of Bryant against Herbert, reported in the Law Reports, Com. Pleas Div., vol. iii. p. 189.

⁴ Comm. vol. iii. p. 152. See Year Book, 6 Henry VII. fo. 9, where Brian, C. J., repudiates the contention that a tortious taking cannot change the property. The reason he gives is, that the person who is so

Action of
replevin.

who had lost possession of his goods without his assent could assert his ownership by retaking them is traceable in the action of replevin. In replevin the party could recover possession through the sheriff, giving security to restore it if the right were adjudged against him. This procedure was generally considered applicable only to cases of goods seized for a distress. But I apprehend that it was not confined to such cases, and that the sheriff could act whenever it was alleged that one party had wrongfully taken possession of the goods of another. The party who complained of the wrongful taking by recovering possession put himself in a position to assert his ownership, which he could not do otherwise. If the other party also claimed the goods as his own, the proceedings were taken out of the sheriff's hands and tried in the regular way. And, as it appears to me, this was at one time a legitimate way, and indeed the only legitimate way, of raising the question of ownership. Afterwards, by the introduction of the action of trover, a person was enabled to claim goods of which he was out of possession, even when he could not prove any undertaking to return them and without resorting to any preliminary seizure: and hence the procedure by a retaking of the goods fell into disuse.

Practical
difficulty
of recover-
ing move-
ables.

512. Whatever may be the law or system of procedure there will always be considerable difficulty in following up the ownership of moveables. The ownership of moveables very often changes so rapidly that to restore them would disturb a great many transactions, the majority of which are perfectly fair and honest. Nevertheless the English law has gone

put out of possession cannot have any action of detinue: to which action it is necessary that the plaintiff should be owner at the time of action brought; and that he should allege that the defendant came by the goods lawfully. But he thinks that the person who has lost the goods by a tortious taking might have replevin; that is, he might get the goods back into his possession, and so put himself into a position to assert his ownership, which, before retaking, he could not do. Brian seems to have thought that it was impossible to separate the ownership of moveables from the possession. Perhaps in so thinking he was rather behind the age in which he lived.

very far in recent times in allowing the ownership to be followed up. Not only is it now impossible for a man to give himself a title by a wrongful act, but even third persons, who have acted in perfect good faith, may be successfully sued by the owner seeking to recover possession of his goods¹. And this, not only in cases where the owner has been deprived of his possession against his will, but even where he has consented to part with his ownership, if he has been induced to give his consent by fraud².

513. To some extent this somewhat extreme view of the English lawyers has been modified by statute, and in commercial transactions persons who honestly deal with those who are entrusted by the owner with the possession of goods are protected³. Moreover the ownership follows the possession in the case of coin and negotiable instruments: and even goods stolen which have been sold in market overt belong to the purchaser.

Owner frequently satisfied with damages.

514. In the English law, therefore, as well as in other systems, there is in some cases a transfer of the ownership of moveables which takes place when the owner is out of possession, though wrongfully so, and quite independently of his consent, or of any acquisition of title by means of prescription. It would be difficult to say exactly when and under what circumstances this change of ownership takes place, since the subject has never been considered thoroughly and as a whole. But the general attitude assumed by the English

Difficulty attending English law.

¹ See the case of *Cundy v. Lindsay*, Law Reports, Appeal Cases, vol. iii. p. 459.

² This is the remarkable feature in the case of *Cundy v. Lindsay*. The plaintiff had not only parted with the possession, he had also parted with his ownership, as he thought; but, because he had parted with the ownership to *A*, believing *A* to be *B*, the Court thought he had not really parted with the ownership. Lord Cairns holds, not that there was a contract vitiated by fraud, but that there was no contract, and he seems to think it idle to consider whether the ownership could pass by the transfer without a contract. But I do not think that is a view which all jurists would accept: and it is only a modern view in England.

³ See the Factors' Acts, 5 & 6 Vict. c. 39; 40 & 41 Vict. c. 39: and the Bankruptcy Act, 46 & 47 Vict. c. 52, s. 44.

law has certainly been in recent times to protect the owner of moveable property so far as to allow him to assert his ownership, until he has parted with it by some act of his own. On the other hand, the English law is rather lax in assisting the owner of moveable property to recover possession of it, even where it allows him to assert his ownership. He must, as I have said, generally be satisfied with a money compensation¹.

Transfer
by gift
or sale.

515. The transfer of ownership which we meet with most frequently is that which takes place either on gift or on sale. These modes of transfer have been very much discussed, and many of the principles which govern these two transactions are common to them both. In both the transfer is a voluntary one. They both involve a declaration of intention by two persons, a transferor and a transferee. On the whole I have found it most convenient to discuss these two modes of transferring ownership together. The observations I shall make are of a very general kind.

Lands
originally
not alien-
able.

516. If we attend only to the present aspect of law we are very apt to speak of the free right of alienation of property, that is, the free right of voluntary transfer by gift or sale, as one of the so-called natural rights of man; meaning, I suppose, that it is a right which *primâ facie* belongs to him at all times and under all circumstances: and we are thus accustomed to treat all forms, restrictions, and conditions, which have been imposed upon the exercise of the right of alienation, as so many infringements of this natural right. It is only when we come to look into the history of the matter that we find this aspect reversed. We see then

¹ If the owner elects to take compensation there appears to be a sort of 'relation back' as it is called. The transactions which have taken place between the time when the owner lost possession and that when he parts with his ownership by receiving compensation are treated in the same way as they would have been treated if the ownership and possession had been parted with simultaneously. But this kind of restitution becomes very complicated when the transactions are numerous.

that the general right of alienation which now exists has been slowly and painfully gained. It has been concluded by inquirers that, in its earlier form, ownership was not individual ownership at all; that ownership was not vested in individuals but in families; in other words, that it was (as we should now say) corporate and not sole¹: and alienation, which was under such circumstances of course difficult, was, if not altogether unknown, at least very rare.

517. Even long after individual ownership had come to be recognised, the right of the individual owner was not considered to extend to alienation at his own will and pleasure. Either the family, or the tribe, or the state, must consent to the alienation in order to render it effectual². This idea is traceable in the two most important forms of transfer under the Roman law. In the *mancipatio* five witnesses were required besides the actual parties to the transaction. This number is, I think, not to be referred to the imperfection of oral testimony³, but to the requirement that the transfer should take place in the presence of and be consented to by the community at large, whom these five persons may be taken to represent⁴. So in the case of *in jure cessio*, or transfer under judicial cognizance, I scarcely think the transaction is to be explained solely upon the ground of laxity of judicial procedure⁵; it was a public

Interven-
tion of the
public.

¹ Maine's Ancient Law, first ed., pp. 258 sqq.

² The Author of the Mitacshara speaks of the consent of townsmen, of kinsmen, of neighbours, and of heirs, to a transfer of land; but apparently he considers that the only consent really indispensable is that of the parties actually interested in the property; Mitacshara, chap. i. sect. 1. verse 31. This treatise is perhaps a thousand years old (see the Preface to Colebrooke's Translation), and it is evident that a number of lingering traditions just then becoming obsolete are here alluded to.

³ See Maine's Ancient Law, first ed., p. 204.

⁴ Like the panchayat or assembly of five in India.

⁵ See Maine's Ancient Law, first ed., p. 289. The notions upon which our Fine and Recovery are founded are different. These were in fact two wholly distinct proceedings, each being based on a suit, but in the former the suit was compromised by the parties, whilst in the latter it was carried on to judgment. Both were simultaneously resorted to, in order to give

act to which superior validity attached; just as it now attaches to the judicial transfer (*gerichtliche Auflassung*¹) of modern German law. And the consent of the state, in which the consent of the family and that of the tribe have probably merged, still plays a part, though a small one, in private transfers. It is asserted by German lawyers that their law to some extent still holds fast to the old principle that every claim to land, to be valid, must be recognised by public authority²; and we shall see hereafter that the French law exhibits a remnant of the same idea³.

Modern
signifi-
cance of
public
interven-
tion.

518. The real significance, however, of institutions which require external consent to the transfer of land has now changed. Though it is agreed to be desirable that property of all kinds should be transferable without impediment, it is, at the same time, perceived to be of first-rate importance that such transfers should be certain and notorious. It is in order to secure this certainty and notoriety in the case of land that the nations of the continent retain as a requirement the interference of some public authority.

Certainty
and noto-
riety.

519. The difficulties which have been felt about securing the certainty and notoriety of transfers of property would have been much less had the ownership of property usually remained unseparated from the possession of it. Except in the case of wrongdoers and intruders we should then have been able to see at once to whom a thing belonged. But, as we know, the tendency of legal development is to separate ownership from possession. The question is therefore of

a complete title; their effects being different. They combine a variety of principles—limitation, warranty, and finality of judicial decision; and they have been helped out by statute. The general assertion that common recoveries are due to the decision in *Taltarum's* case is not borne out by the report in the Year Book, 12 Edw. IV. chap. 19.

¹ Allgemeines Landrecht, Part i. tit. 10.

² Gerber, Syst. d. Deutsch. Pr. R. § 89; Dernburg, Lehrb. d. Preuss. Pr. R. § 240; Bluhme, Encyclopädie, sect. 190. Bluhme speaks of judicial cognizance as taking the place of delivery; but it also takes the place of the consent of the community, and makes the transaction a public act.

³ Pothier, Œuvres, vol. ix. p. 425, ed. Bugnet; infra, sect. 529.

constantly increasing importance, can the ownership be transferred without a transfer of possession?

520. Fixing our attention for a moment on the Roman law, we can hardly doubt that at first, in order to complete a transfer of ownership, it was necessary in all cases that the actual possession should be transferred from the transferor to the transferee, simply because ownership without possession was not a legally recognised situation. If it occurred it was by accident or wrong, and was a defective condition to be remedied as soon as possible. What more was necessary to a change of ownership than a change of possession depended upon circumstances. Some things, as for example the *res nec mancipi*, could be transferred by the mere agreement of the parties followed by tradition. Other things could only be transferred when the transfer was carried out by a special procedure.

Roman
law re-
quired
delivery.

521. The original object of this procedure as well as that of tradition was, undoubtedly, to accomplish the transfer, which, it was supposed, could not be accomplished without it. But, as simpler means of accomplishing this object suggested themselves, then it was probably seen that the acts which accompanied a transfer served another purpose. It was probably perceived that, besides accomplishing the transfer, which might now be accomplished otherwise, they served as formalities which were useful for the purpose of giving notoriety and certainty to the transaction.

522. The possibility of a transfer of ownership by arrangement between the parties unaccompanied by a transfer of possession had certainly occurred to the Roman lawyers, because they prohibited it. When it first occurred to them, which probably was about the time when it was first prohibited, I do not know. The prohibition occurs in the Code¹, and it is from thence that it is usually quoted. I am equally unable to say when the idea of transferring ownership with-

¹ Codex Just. 3. 2. 20.

out transferring possession became familiar in modern law. To some minds it can scarcely be said to be familiar still¹.

Reasons
why de-
livery not
now neces-
sary.

523. There are many reasons why delivery of possession has not held its ground as a necessary condition to the transfer of ownership. Its most strenuous supporters must admit that there are many transactions in modern times to which the condition of delivery is unsuitable; and to restore it we should have to revert to a simplicity which it would now be found impossible to maintain. Moreover, the rapidity with which it is generally desired that all business should be transacted would render the cumbrous process of actual delivery intolerable, even where it was possible. Whether or no mankind has, upon the whole, gained or lost by the abandonment of delivery as a condition to the transfer of ownership is not, of course, a question to be considered here. At any rate the change is one which has been very widely accepted.

524. It is by no means an easy thing to give even the most general idea of the course which the laws of different countries have taken upon the subject of delivery as a condition of the transfer of ownership: and yet some such general survey is almost necessary if we are not to look upon our own law as something merely arbitrary and accidental. One thing can be affirmed generally—that a broad line of distinction is everywhere drawn between the transfer of moveables and that of immoveables: though of course this distinction is a post-Roman one.

Delivery
still im-
portant.

525. It is also desirable to remember, as a general proposition, that though modern systems of law do not generally

¹ Heineccius, Book ii. tit. i. sect. 239 (quoted by Austin, vol. ii. p. 997), solemnly declares it to be a universal maxim of law that there can be no acquisition of ownership without tradition. He is refuted by Austin, *ubi supra*. An English lawyer, Mr. Serjeant Manning, has made a similar assertion (Manning and Ryland's Reports, vol. ii. p. 568 note); and he has been answered by Mr. Justice Blackburn (Contract of Sale, p. 189). These refutations are interesting and instructive, but they were really not necessary; for, as the Hindoo lawyers say, 'a fact is stronger than a hundred texts.'

make delivery a necessary condition to the transfer of property, delivery of possession is still a matter of very great moment in such transactions. It is a large step in legal ideas, and one fraught with consequences of the highest importance, to establish clearly that, if I sell property to you, the property becomes yours immediately the contract is concluded; that you not only have a right to obtain the ownership, but that the ownership is actually obtained. But, notwithstanding this, it is well to remember that the ownership so obtained is, as compared to ownership accompanied by the possession, of a very risky kind.

526. This is very conspicuous in the case of moveables, which are very frequently and very easily transferred. For example, if *A* sells a horse to *B*, the horse may become *B*'s though he remains in *A*'s stable, and *B* has never been near him during the transaction. But under some systems of law if *A* subsequently sells the horse to *C*, and *C* purchases it in good faith, then if *C* takes the horse away it becomes the property of *C*.

Precariousness of title to moveables without possession.

527. The general principle upon which this and numberless similar cases rest is that the transactions of life could hardly be carried on, if, in the case of moveables, it was not safe to deal with the person in possession on the hypothesis that he was the owner. But it is obvious that we have here two conflicting ideas; and by the concessions made to both we almost seem to take away with one hand the ownership conferred by the other: in other words, without delivery we give an ownership, but one which is so precarious that it scarcely seems to be ownership at all.

528. This appears most strongly in the condition of the French law, where there is an actual controversy as to whether by a sale without delivery the ownership is transferred, though, I confess, I cannot doubt on which side the truth lies. The Code Civil says in express terms that, as soon as a bargain is concluded, without anything more, the ownership passes. But it also recognises in a very large and general way the

French law as to sale without delivery.

preferential title of a person who is in possession over one who is not: so that ownership which has been acquired without delivery is especially risky under the French law. Thereupon it has been maintained that until delivery has been made the ownership is not transferred at all; or what is worse still, that it is transferred or not transferred according as it is the seller or an honest third party who raises the contention. It seems to me clear that those commentators are right who maintain that the ownership is transferred; a result fraught with consequences of the most important and beneficial kind, which would be greatly impaired if any doubt were thrown upon the transfer. But the transferee must remember that these are advantages which he can only fully enjoy when he is dealing with persons in whom he has full confidence. In dealing with a suspected person the only safe course is to get possession ¹.

Delivery
on sale
of land.

529. With regard to land the development of the law has been somewhat different. In the first place, the delivery of land is not the same thing exactly as delivery of moveables. Moveables can be placed under lock and key. Land, if it is of any extent, and still more if it is unenclosed, cannot be placed entirely under the control of the intended possessor: and the possession cannot easily be made notorious. Now notoriety is one of the very things which we desire to secure, and delivery in order to give notoriety to the transfer must be something more than nominal. On the other hand, another

¹ See Anstin's Lectures (3rd ed.), p. 1003. It will perhaps be convenient if I quote some passages of the French Code: Art. 1138, 'Elle (l'obligation de livrer la chose) rend le créancier propriétaire . . . encore que la tradition n'en ait point été faite;' Art. 1383, 'celle (la vente) est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur à l'égard du vendeur, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée, ni le prix payé;' Art. 1141, 'si la chose qu'on s'est obligé de donner ou de livrer à deux personnes successivement, est purement mobilière, celle des deux qui en a été mise en possession réelle est préférée et en demeure propriétaire, encore que son titre soit postérieur en date, pourvu toutefois que la possession soit de bonne foi.' See the observations of M. Marcadé on these articles.

and a very simple and convenient method has been hit upon of giving notoriety and exactness to the transfer of land without troubling ourselves about possession. This may be described as the insertion in a book kept at a public office called a register of an account of the transaction between the parties by which the transfer takes place; which account is acknowledged by the parties before a public officer to be correct. It is generally in fact a copy of the instrument executed between the parties themselves. The practice of inscribing a copy of private documents in a public register seems to have been originally introduced by the Emperor Leo in reference to gifts¹; the object being, it is said, to enable heirs to ascertain to what claims the estate was liable before deciding whether to accept the inheritance. The proceeding was called *insinuatio*, and under that name it survived in the French law down to the time of the Code Civil².

Publicity now generally secured by registration.

Insinuatio; the origin of registration.

530. The requirement of registration thus established in reference to gifts seems to have been applied in the next instance to the pledge of land. The reason of this was obviously in order to supply the publicity which was wanting in a pledge; this being a transaction to which delivery was earliest resolved not to be suitable. But a pledge always contemplates a possible sale, and consequently pledges and sales are very closely connected: whence we find that rules of registration are frequently extended from pledges to sales also; and in fact to all dealings with land whatsoever.

Extended from gifts to pledges and transfers.

531. The law of registration on the continent of Europe can hardly be comprehended, even generally, without advertence to an officer scarcely known in England in connexion with land, but who in other countries plays a very important part in all transactions of business: I mean the notary, or notary public³. The resort, which is had upon almost all

¹ Codex Just. Book viii. tit. 54. sect. 30.

² Pothier, Œuvres, vol. i. p. 364; ed. Bugnet.

³ The Latin term which appears to correspond most nearly with

occasions in France and Italy to a notary to draw up the documents relating to any business in hand, is no doubt partly based on the rigid adherence to forms, which has prevailed in countries where the legal systems are based upon the Roman law. It is also partly based upon the immense convenience which results to the parties from the credit which attaches to a notarial transaction; such a transaction being always presumed to be valid and binding, until it has been impeached and set aside by a separate proceeding instituted for that purpose. But it would be incorrect to consider the notary as the mere private agent of the parties, or merely as a person of superior fidelity. Under the French law the notary is clearly a public officer, and his intervention is looked upon as the intervention of the public authority, which through its officer ratifies the transaction.

Notarial transactions are public acts.

Transcription.

532. In France all documents executed in the presence of a notary having any reference to the creation or transfer of an interest in land are transcribed by him in a public register, which register is most carefully kept and is rendered as far as possible available for general information ¹.

German law.

533. In Germany the transfer of ownership in land is a strictly judicial proceeding. The private transaction between the parties which leads them to desire the transfer is not noticed. They apply to the court for a transfer and that is enough. This application assented to by the court forms one stage in the proceedings (*Auflassung*), and the other

'notary' in the modern sense is *tabellio*. For an account of the many changes in the nature of the office of notary, see Savigny, *Geschichte des Römischen Rechts*, chap. 2. sect. 16; chap. 6. sect. 140.

¹ The following references may be useful, if more information is desired upon this subject than is given in the above slight sketch. The transcription of pledges at the Bureau des Hypothèques is provided for in France by the Code Civil, art. 2146; the transcription of gifts *inter vivos* by art. 939. The registration of all documents relating to land when executed privately (*sous signature privée*) is required by the Loi du 22 frim. an xi. The general regulations as to the office and duty of a notary are contained in the Loi du 25 vent. an xi. See the Italian Civil Code, art. 1315 sqq., Dell' atto pubblico, and art. 3. 1932 sqq. Della trascrizione.

is the entry of the transferee's name on the register (Eintragung)¹.

534. There is no registration of the kinds above described in England. The registries of Middlesex and Yorkshire do not furnish a complete record of the transactions which affect the land: nor is a registered transferee ever safe against subsequent transactions. In Ireland registration is more effectual; but even there registration is not essential to the validity of a transfer: all that the law says is that a registered transfer is to be preferred to an unregistered one². The subject of registration has been much discussed in England during the last thirty years, and more than one attempt to establish a system of registration has been made without success. The doubts and complications which surround titles to land in England are so appalling that Parliament has never yet dared to make registration compulsory, and many persons think that until titles have been simplified it never will.

No registration
necessary
to sale of
land in
England.

535. Whilst, however, in England we have no record of the history of transactions relating to the ownership of land in the public archives, that record is generally found to exist to some extent in certain documents which every owner of land possesses. It is the almost universal custom to narrate in private documents, at great length, and with very frequent repetition, the history of transactions relating to landed property; and many other events which affect the ownership besides actual transfers are there stated, such as mortgages, trusts, marriages, deaths, and so forth. All the documents containing this narrative are carefully preserved, and form what are called the 'title deeds' of the property;

¹ See Rönne, *Staatsrecht der Preussischen Monarchie*, sect. 362 (*Grundbuch und Hypotheken-wesen*); and the rules relating to the office and duty of notary, s. 364. See also Dernburg, *Lehrb. d. Preuss. Pr. R.* vol. i. §§ 193, 240. The transfer of land by fine and recovery in England and the statute of enrolments has some resemblance to the transfer by judicial act of continental law.

² Report on Registration of Title, 1857, p. 15; Second Report of Real Property Commissioners, p. 35.

Their use
as a pro-
tection
to pur-
chasers.

and unless this narrative is tolerably complete, and can be either handed over to the purchaser or rendered otherwise accessible to him, it is scarcely possible to take land into the market at all¹. And the protection afforded by this practice is in some respects analogous to that which is afforded in other countries by registration. Claimants who do not appear upon this private record are not absolutely excluded. Nevertheless, if after the most thorough and careful examination of this record by persons of great skill and experience, there be still any claim to or upon the property which has not been discovered by the purchaser, he will, at least if he has actually got into possession, very probably be protected against it. But if he has, or might have had by due diligence, what is called *notice* of the claim, he must give up the property or buy off the claimant.

536. On the other hand, the very act of bringing together every transaction relating to land and placing them all in a lump under the eye of the proposed transferee is in one respect a positive disadvantage, at least in England. For in England the transactions of landowners with their land are so numerous and complicated, the powers of disposition are so wide, and the interests in land are so various, that even with a complete history of the property before you, it involves a very long, troublesome, and expensive inquiry to ascertain whether as a result of all these numerous transactions the transferor has or has not a good title to deal with the property in the way he proposes. There are many of these transactions which have long ago ceased to have any operation upon the property; but of course a careful person will desire to assure himself that this is the case, and this is a very costly operation. The small advantages, therefore, of this quasi-registration in England are balanced by serious disadvantages.

¹ An owner who brought his land to market without deeds would be looked upon with suspicion: Sugden, Vendors and Purchasers, 14th ed., p. 438.

537. The matter is mixed up with the complications arising out of the competing systems of law and equity. This I can best illustrate by an example. Suppose *A* agrees to sell his land to *B* but does not execute a conveyance: and he afterwards agrees to sell the same land to *C* and does execute a conveyance to *C*. *C* is the legal owner of the land: and *B* must sue *A* for his breach of contract. But *B* has been all along the equitable owner: this equitable ownership will, however, be annihilated upon the conveyance being made to *C*, provided that *C* was not aware of the sale to *B*. If *C* was aware of the sale to *B* then *C*'s ownership is annihilated, and the real ownership is maintained in *B*. Hence the very ignorance of *C* may be that which furnishes his protection¹.

538. It will be seen from what I have said in the last three Notice. paragraphs that the doctrine of notice plays a very important part in the transfer of ownership of land. This doctrine is founded, no doubt, on a perfectly correct and just principle. For some purposes and to some extent the apparent owner of property must be treated as the real owner, and whilst our law allows almost unlimited freedom in the creation of rights over things, and has almost wholly abolished or declined to adopt the rules which require that the creation of such rights should be completed by some public and notorious act, it is only natural that it should protect those who have purchased in good faith from persons who are believed to be, and have all the appearance of being, owners. But purchasers who know when they purchase that other persons lay claim to the property have not the same moral claim to this protection and the law does not give it to them. From this point of view the doctrine of notice is defensible. But it has been carried to a very great length in the English

¹ Hence the endeavours used by conveyancers to 'keep off' from their title transactions which might give rise to troublesome inquiries. Sometimes vendors protect themselves by special stipulations against the necessity of satisfying these inquiries, and recent legislation has facilitated the obtaining this protection.

Court of Chancery. It has of late years been applied to equitable claims on personal estate; and the question of good faith or diligence has somewhat receded into the background¹.

Cannot be accurately defined.

The main objection to the doctrine of notice is that it has been so interpreted by the courts as to have been brought into a condition in which we find technicality combined with cumbrousness and extreme indefiniteness. It no longer merely signifies knowledge. It means something more than this, but what more no man can tell. It is described sometimes as constructive notice; sometimes as implied notice; sometimes as notice in law. An experienced conveyancer could, indeed, in most cases, make a very fair guess whether the Courts of Chancery would treat a thing as notice or not. But for a private person to attempt to form an opinion upon this point would be highly dangerous, and the attempt to instruct people as to what notice is by giving a description of it has been given up as hopeless². The consequence is that all transactions relating to landed property in England have to be conducted by several sets of very highly qualified, and therefore of course also very highly paid experts; and the most difficult and intricate inquiries have to be made on every occasion that any such transaction takes place. The enormous expense and cumbrousness of such transactions no doubt operate very extensively as a check upon the alienation of landed property³.

Great expense of investigating title.

Difficult to state our law of transfer.

539. I do not profess that this is at all a complete statement of the law of England on this subject, which is of

¹ See the judgment of Lord Macnaghten in the case of *Ward against Duncombe*, Law Reports, Appeal Cases, 1893, p. 383. One of the strangest ideas ever breached was that by the equitable doctrine of notice the trustees of property became a sort of 'register' of the claims against the property: *ib.* p. 393.

² Sugden, *Vendors and Purchasers*, p. 781, 14th ed.

³ The recent acts relating to the conveyance of land have prepared the way for an extensive simplification of the law, but that simplification remains still to be made. The scheme of the framers of these acts seems to be to make the law easier to work upon the old principles: a considerable boon, no doubt; but all that is required cannot be obtained by working upon the old lines, and merely improving the old machinery.

extraordinary complication; partly on account of the very large licence allowed to owners of property in loading it with trusts, and in making posthumous and substitutional dispositions of it; partly because our law has not been made on any plan, and has been allowed, to some extent at least, to grow out of selfishness and caprice; but chiefly on account of the conflict (not yet at an end) between courts of law and of equity: one set of courts recognising one person as owner, the other set of courts recognising another person as owner, of the same property at the same time, and under the same circumstances; and each set of courts persistently keeping out of view that which the other recognises: for which reason no proposition about the transfer of ownership can be stated very accurately, and at the same time affirmed to be generally true. But what I have said may serve to give the student some notion of the point of view from which the matter is dealt with by English lawyers.

540. It is observable that whilst the English law has not adopted any general system of registration in respect of land, the registration of sales of personal property, when possession is not taken by the transferee, is necessary. The registration is, however, necessary in this case, not in order that the ownership may pass to the transferee, but in order to prevent the transferee being deprived of the ownership which he has acquired. This annulment of the transferee's ownership can only be demanded on behalf of the creditors of the transferor: the principle of the act being that a transfer made under such circumstances is not void, but presumably fraudulent. Bills of sale.

541. The effect of the omission of the formality is, I think, in this case clear. The ownership is in the transferee without registration, and it is not affected until the transfer is impeached by a creditor. But there are other cases in which it is doubtful whether a formality, which is clearly necessary to make a title unimpeachable, is also to be considered as a condition which must be fulfilled before the ownership Effect of omission of formalities.

can pass. A doubt of this kind has, it will be remembered, arisen with regard to tradition under French law; and the same doubt has arisen in Germany with regard to the position of persons who, from no fault of their own, have not got their names upon the register, but have got into possession¹. In England a person to whom a complete conveyance had not been made, but who was entitled to demand it, would be looked upon as equitable owner, which in all essential particulars differs only from legal ownership in this, that it is liable to be defeated by a subsequent purchaser for valuable consideration without notice who has got the legal estate.

Rules as to
proof of
transfers
when
writing
necessary.

542. There is a set of rules affecting the mode of transferring ownership and other rights over things which is based upon a principle distinct from that of securing publicity, but which also works to that end. These are rules which are primarily intended to prevent litigation by securing facility of proof. Every transfer of ownership in the nature of a sale or gift, involves a contract which may be coincident with the transfer of ownership, but is very often separated from it by an interval of time. Moreover a sale very frequently, and a gift less frequently, may be a complicated transaction. The exact extent of the ownership transferred very often has to be scrupulously defined; certain *jura in re* are frequently reserved, and the transaction generally is not a mere transfer of a simple right, but is accompanied by covenants, agreements, and conditions between the parties, giving rise to a variety of rights in *rem* and in *personam*. Unless, therefore, the sale be of articles of immediate consumption, the possession of which is at once transferred, and the price paid, the terms of the contract may come into question some considerable time after it has been concluded. Having regard, therefore, to the fallibility of oral testimony as to past transactions, the parties to the transfer are in many cases required by the law to put their

¹ See Dernburg, *Lehrb. d. Pr. R.* vol. i. § 240.

intentions into writing, so as to avoid the endless disputes, and even fraud and perjury, which would inevitably arise if important transactions were entrusted to the memory of witnesses. Thus the Statute of Frauds in England, as a general rule, requires a writing in all transactions relating to land, or to goods valued at over ten pounds. In Prussia it is required in all contracts of the value of seven pounds ten shillings¹; in France in all contracts of the value of six pounds². But as soon as a transaction has been recorded in writing it is much more likely to become notorious than if it had passed by word of mouth only.

543. Sometimes other solemnities besides writing but also intended to secure facility of proof have been made necessary to an effectual sale. The French law, for example, contains some very minute and irksome provisions as to the form of signing and drawing up contracts³. And before the art of writing was as well known as it is now, instead of a writing some other formalities were in use in order to make the intention clear, and to impress the transaction on the memory of the parties⁴; such as shaking of hands, nodding the head, the repetition of certain formulæ, giving of earnest money, and so forth. Some of these forms still linger in the habits of the people.

544. There is an important distinction between the two classes of ceremonies which I have above referred to. For whereas omission of ceremonies of the first-mentioned class, such as delivery or registration, usually only affects the validity of the transaction as regards third parties—that is to say, it affects only the transfer of the ownership or right in rem, but not the creation of the obligation or right in personam—the omission of those of the last-mentioned class

Other solemnities besides writing.

Distinction between rules of proof and other rules.

¹ Fifty thalers; Allgemeines Landrecht, Part i. tit. v. sect. 131.

² One hundred and fifty francs; Code Civil, art. 1341.

³ Loi du 25 vent. an xi. sect. 2; Roger et Soel, Codes et Lois Usuelles,

p. 574.

⁴ Bluhme, Encyclopädie, sect. 80.

affects the validity of it as regards the parties to the transaction itself. This is a consequence of the political origin of the two sets of rules. Facility of proof is as much required between the actual parties to the transaction as where third parties are concerned : whereas publicity only concerns third parties, and the rules which ensure it therefore only come into play when third parties come forward. It is for this reason that the two sets of ceremonies must be kept apart. In point of fact, however, all the rules as to solemnities do co-operate in enforcing both the objects mentioned above ; all of them tend to make the transaction public ; all of them assist in facilitating proof.

CHAPTER XIII.

ON PRESCRIPTION.

545. IN nearly every system of law it is recognised that, Acquisition of rights by time. if a person has been in possession of a thing, or in the enjoyment of a *jus in re alienâ* for a considerable time, defects in his title or in his manner of acquiring ownership are cured. Sometimes all these defects are cured; at other times some of them only: and some defects are more quickly cured than others.

546. The justification of this institution is to be found in How justified. the inconvenience and hardship of disturbing a possession which has been long enjoyed.

547. In the Roman law we find at a very early date this Roman law. principle acknowledged. It was there called *usus* or *usucapio*. By the law of the Twelve Tables it was ordered, ‘*usus auctoritas fundi biennium, ceterarum rerum annuus esto.*’ ‘*Usus*’ here signifies possession, and ‘*rem usu capere*’ signifies to acquire ownership of a thing by possession¹. In the early Roman law ownership was acquired after two years in the case of land; and in one year in other cases. But to have

¹ The principle by which ownership is made in the case of moveables to follow possession independently of *usucapio* (*supra*, s. 507 sqq.) was, I believe, unknown to the Roman law.

this effect the possession must have been acquired on a *justa causa*, which, I think, an English lawyer would translate 'under colour of right,' and the possessor must also have acted *bonâ fide*: so that really the only defects cured were defects in the manner of acquiring ownership; defects of form; as we say, and not defects of substance¹.

Recast by
Justinian.

548. The rules of Roman law relating to the acquisition of ownership by prescription varied from time to time. They were recast by Justinian, and in this process, or soon after it, a change of name was effected which it is important to understand, but to explain which I must first go a little out of my way to notice another institution.

Rules of
limitation
in Roman
law.

549. Side by side with the *usucapio*, and at many points closely connected with it, was a rule which simply said that persons who sought the protection of the law must seek it within a certain prescribed period after the cause of complaint had arisen. There were many cases in which a person against whom a claim was asserted could meet it by simply saying that it was asserted too late. This plea of the defendant was called by the Roman lawyers '*praescriptio*.' The first general rule requiring all actions to be brought within a specified time is found in the Theodosian Code, which fixes the time at thirty years, but it existed in particular cases long before that time².

Effect of
limita-
tion.

550. It is plain that a plea that the claim is asserted too late (*praescriptio*) effects some of the objects which are more fully attained by *usucapio*. If *A* has got into the possession of the property of *B*, and *B* seeks to recover the property, it will answer just as well, in order to repel *B*, to say that he has made his claim too late, as to say that his ownership is transferred to *A* by lapse of time. But if *A* were out of possession and the thing had got into the possession of *C* the

¹ As a general statement this is, I believe, true; but there was in certain special cases *usucapio* which cured the graver defects of title, and which, on that account, was called '*lucrativa*.'

² Cod. Theod. 4. 14. Cod. Just. vii. 39. 3. Dernburg, Syst. d. Preuss. Pr. Rechts, vol. i. § 163; Windscheid, Lehrb. d. Pandekten-rechts, s. 105.

difference between usucapio and a simple plea that the action is brought too late becomes at once apparent. If there has been usucapio *A* can successfully sue *C*, but the plea is useless to him.

551. It appears however that in many cases a person who, strictly speaking, could only have had the benefit of the plea that a suit against him to recover the property was brought too late, was allowed by the prætor to recover the property from a third person who had got possession of it. Practically, in all these cases the prætor gave to the party who had the plea the benefit of usucapio, though the ownership thus given was only bonitary and not quiritary ownership. But Justinian abolished the distinction between these two kinds of ownership, and he also gave the ownership to the possessor in a good many cases where previously he would only have had as a defence the plea that the action was brought too late; and partly perhaps for this reason, and partly also because there was some confusion as to the true nature of the two institutions, the term usucapio was dropped out of use by writers on the Roman law subsequent to the Code, and the term prescription was applied to both. This has been continued down to the present day. Thus in France and Italy, whether a man claims that ownership is transferred to him by possession, or whether he defends himself on the ground that the action is brought too late, he is said to rely on prescription. In Germany the acquisition of ownership by possession is called 'Ersitzung,' and the bar to the action 'Verjährung.' We use in England the terms prescription for the former and limitation for the latter. And inasmuch as the two things are really different it is better to have the two names.

552. In England the word 'prescription' (as defined by Lord Coke)¹ signifies the acquisition of title by length of time and enjoyment. This would serve as a general description of usucapio, but nevertheless we shall see that

Change in
the mean-
ing of pre-
scription.

Prescrip-
tion in
English
law.

¹ Co. Litt 113 b.

the prescription of English law differs in some important particulars from both the *usucapio* of the earlier Roman law and the prescription of the later.

553. As regards the effect of time upon the right, there are three positions to consider. A right may either be transferred by possession, or it may be barred by non-claim, and if barred by non-claim, it may be either extinguished altogether, or only denuded of its ordinary legal protection. So at least it is considered by jurists, and many disputes have arisen as to which view in a given case ought to be taken¹. The difference is not unimportant: for a right may be useful for some purposes, even where it is not enforceable by action. If, for example, the owner out of possession gets back peaceably into possession, and his ownership has been in the meantime transferred by prescription, he is in possession wrongfully. If his ownership has only been extinguished he may not be in possession wrongfully, and he may be in possession as owner, though possibly not of his old ownership. If his former ownership were not extinct, but only his action, he would be restored to his old ownership with all the rights attaching thereto.

Prescription applied to land.

554. Nearly all English lawyers, led by Blackstone, lay it down as a general rule that the acquisition of the ownership of land by prescription is unknown to the English law². This is not the language of either Littleton or Lord Coke, and I do not think it is correct. No doubt the form of English legislation has generally been to bar the action: and the principle of acquisition of ownership in land by possession has nowhere been directly affirmed. But such acquisition appears always to have been, and still to be, possible.

Early legislation.

555. The early method of legislation on the subject is thus described by Lord Hale³:—‘The use was in England to limit certain notable times within the compass of which those titles which men designed to be relieved upon must

¹ See Unger, *System d. österr. Allgem. Pr. R.* vol. ii. p. 435.

² Blackstone, *Comm.* vol. ii. p. 264.

³ *History of the Common Law*, p. 122.

accrue. Thus it was done in the time of Henry III by the Statute of Merton, cap. 8, at which time the limitation in a writ of right was from the time of king Henry I, and by that statute it is reduced to the time of king Henry II, and for assizes of mort d'ancestor they were thereby reduced from the last return of king John out of Ireland, and for assizes of novel disseisin a *prima transfretatione regis* in Normanniam. . . . And this time of limitation was also afterwards, by the statutes of Westm. I. cap. 39 and Westm. II. cap. 2, 46, reduced unto a narrow scantlet, the writ of right being limited to the first coronation of king Richard I.'

556. This practice of renewing from time to time the periods of limitation for the recovery of land was afterwards discontinued, and a general period of twenty years was fixed by the 32 Hen. VIII, c. 2, and 21 Jac. I, c. 16. The law was amended by the 3 & 4 Will. IV, c. 27, and the period was reduced to twelve years by 37 & 38 Vict. c. 57.

Modern
legisla-
tion.

557. Now to understand the position of a person in possession of land under these statutes it is necessary to bear in mind that possession itself is presumptive evidence of title. This is certainly so in English law. And this presumption would of itself alone be sufficient both to protect the possessor against intruders, and to enable him to recover against any person who wrongfully deprived him of possession, were it not that it can be turned against himself. For if it can be shown that some one else was in possession earlier still, the presumption may be that that person was the owner, and this presumption the second possessor can only meet by showing that the ownership has really passed to himself¹.

Possession
as evi-
dence of
title.

¹ See and compare *Doe v. Carter*, Queen's Bench Reports, vol. ix. p. 863, and *Doe v. Barnard*, ib. vol. xiii. p. 945. See also *Doe v. Cooke*, Bingham's Reports, vol. vii. p. 346. Whatever may have been the case once, I think that in modern times possession of land is in itself merely evidence of title, the whole effect of which is done away with as between two rival claimants as soon as one of them shows that he was in prior possession. Of course this gives the advantage of the presumption to a casual possessor, and this under some circumstances would be a temptation to lawlessness. But the 'casual possessor' of land is in

Operation
of statutes.

558. But here the statutes come in and greatly assist the party who has been long enough in possession to get the benefit of them. Suppose, for example, that *A* is the owner of land, of which *B* gets into possession and remains in possession for twelve years, and after that *C* gets into possession. If *B* sues *C* he can ask to have his title presumed as against *C* from his prior possession. And if *C* sets up the still prior possession of *A* he will be met by the statutes of limitation. For the modern statutes of limitation, after the necessary period has elapsed, certainly extinguish *A*'s title. That is a settled point of English law. The title of *A* cannot, therefore, be set up against *B*, and *B*'s title will be impregnable.

559. This is the case of one man (*B*) holding for twelve years. If several persons in succession hold the property, then also after the lapse of twelve years *A*'s title will be extinguished. But whether the person actually in possession has an impregnable title would depend upon circumstances. If a period of twelve years could be made up by successive possessors succeeding each other by descent, will, or conveyance, the last of such persons would be secure¹. No presumption would arise from any previous possession which would injure him. The doubtful case is where the necessary period is made up by a succession of persons who are strangers to each other, no one of whom has himself held for twelve years. This is a very rare case, and it is not easy to say how it is provided for by English law. But setting aside this doubtful case, the statement that there can be no acquisition of ownership of land by prescription in English law can hardly be maintained.

Bona fides
and justa
causa.

560. From the peculiar way in which the law on this subject has grown up in England certain restrictions which are elsewhere placed upon the acquisition of ownership by

modern England a very rare person. In turbulent times and where law is weak it is necessary to give special protection to possession as against wrongdoers apart from title, as in India in the present day. See Code of Criminal Procedure, chap. xii.

¹ See the case of *Asher v. Whitelock*, Law Rep., Q. B., vol. i. p. 1.

possession are neglected in the English law. It is a general rule of jurisprudence that neither bona fides nor justa causa are in question when the defendant pleads limitation as a bar to an action. But it is also a general rule of jurisprudence that when it is asserted that a title has been gained by prescription, then the judge ought to see how the party got into possession, and ought not to allow a title to be acquired dishonestly, or, at least, he ought not to allow it to be acquired so soon. But in the English law this distinction has been to a great extent overlooked, probably because we have not kept clearly distinct the principle of limitation by which actions are barred, and the principle of prescription by which titles are acquired.

561. As regards moveables the question whether and when the ownership of them is transferred by prescription very seldom arises, because, whatever may be the form of action, all that the owner of moveables can, except in very rare cases, obtain, is compensation for his loss, and not the goods themselves in specie. And this claim for compensation is very soon barred. The question might arise in practice if the party to whom the goods originally belonged got back into possession, after all his remedies for the recovery of the goods or their value had been barred. It would then be necessary to decide whether his ownership had been extinguished, as in the case of land; and it would be somewhat strange if the courts were to hold that the ownership of moveable property remained, when under analogous circumstances the ownership of land was extinguished. If it were considered that the ownership of moveables was extinguished, there might still be a question, who has acquired the ownership? Practically this would come back to the question of the effect of possession as affording presumption of title, for, as in the case of land, possession of moveables is presumptive evidence of title.

562. The acquisition by prescription of jura in re has, in the English law, got into considerable confusion. Consequently, whenever questions arise upon this topic of law,

Prescription applied to moveables.

Prescription applied to jura in re aliena.

judges find themselves in serious difficulties. This confusion has, I think, arisen from the principles which govern prescription proper not having been distinguished from the principles which govern another institution to which English lawyers also apply the name of prescription, but which ought to be kept distinct. The English law of prescription as applied to the acquisition of *jura in re alienâ*, besides covering the acquisition by enjoyment for a certain definite time, also comprehends the acquisition by enjoyment from time immemorial. Now the principles of acquisition in the two cases are distinct: and I shall endeavour to explain the distinction.

Enjoy-
ment from
time im-
memorial.

563. The acquisition of rights by enjoyment from time immemorial is a principle of very wide application. At the present day it is by no means confined to the acquisition of *jura in re alienâ*. It is even applied in public law. Savigny gives an instance of this from the history of England¹. For a considerable period after the Revolution of 1688 many conscientious persons felt doubts as to the legality of the existing government. But before the death of the last of the Stuarts in 1806 those doubts had ceased. This could not be because the existing government had gained a right by ordinary prescription, for there could be none in such a case. The principle which operated was that of acquisition by 'time immemorial,' which is thus stated by Savigny:—'When a condition of things has lasted so long that the present generation never knew any other, and their forefathers knew no other, then it must be assumed that this condition of things is so bound up with the convictions, feelings, and interests of the nation that it cannot be disturbed.' Savigny considers that in the Roman law the principle of time immemorial applied only to three kinds of rights—*viae vicinales*; rights connected with the prevention of floods; and rights connected with the supply of water. He seems to think that it was as being matters of public concern that the principle of

¹ Savigny, *Syst. d. L. Pr. R.* § 195.

time immemorial was applied to these rights. The notion of the Roman lawyers seems to have been that in regard to a thing '*cujus memoriam vetustas excedit*,' if the public were interested in it, they ought to treat the case in the same way as if a *lex* had authorised it ¹.

564. As regards the length of time which would be considered time immemorial the common expression is '*cujus contrarii non exstat memoria*' ^{Length of time required.} ². The '*contrarii memoria*' seems to mean a recollection of the time when no such right existed. If there is *memoria* of this, any presumption in favour of the right is excluded. And the result of two passages in the Digest upon the subject appears to be, that if any person comes forward and can say, either from his own recollection or from the information of others speaking from their own recollection, that the thing was at one time illegal, the presumption will be excluded. But more ancient information than this as to any illegality would not be sufficient ³.

565. There have not been wanting persons who consider that between acquisition by prescription and acquisition by enjoyment from time immemorial there is no real distinction of principle: that the root of the acquisition in both cases is the long enjoyment; and that if time immemorial cures any defects which prescription does not, that is only because in the former case the enjoyment has lasted longer. The other view is, that in the case of time immemorial there is no acquisition of right, but only presumption in favour of the legal origin of a right which has been long enjoyed ⁴. The two views are entirely distinct, and the difference is of great practical importance. For if there be an assumption of a legal origin, that assumption may be rebutted by the party opposing the claim bringing evidence to show that the assumption is unfounded. ^{Presumption of legal origin.}

¹ Savigny, Syst. § 196.

² *Ib.* § 198. An equivalent, though more general expression is '*vetustas*,' § 196, note (p).

³ *Ib.* § 199 p. 517) and § 206 ad fin.

⁴ *Ib.* § 206.

Com-
parison
between
English
and
Roman
law.

566. If we consider the English law we shall find that an English lawyer when he speaks of prescription is nearly always thinking only of the acquisition of *jura in re alienâ*, and having in his mind rights of this kind he frequently says that our rules of prescription are derived from the Roman law. It has indeed been said, that the law of England 'as cited by Lord Coke from Bracton exactly agrees with the civil law¹,' by which is probably meant the *Corpus Juris Romani* as understood by the commentators upon it. But to this extent I am unable to go. I doubt whether the present law of England on this subject can be identified with that laid down by Bracton; or that laid down by Bracton with what is called the civil law. I must first remark that Lord Coke, in the passage referred to, misquotes Bracton. He applies to the acquisition of things incorporeal words which Bracton expressly limits to the discussion of the acquisition of things corporeal; the acquisition of rights over things incorporeal being reserved by Bracton for the following chapter, which contains nothing directly bearing upon the subject of prescription². Bracton, indeed, as far as I can discover, nowhere treats directly of the acquisition by prescription of rights other than ownership, except in the single case of common of pasture; to which passage Lord Coke also refers, but which again he does not correctly quote³.

567. Moreover, neither as regards corporeal things, nor as

¹ Gale on Easements, p. 122.

² Coke upon Littleton, fol. 113 b. The passage of Bracton to which Lord Coke refers is in book ii. chap. xxii. fol. 51 b. The words are, 'Dictum est in precedentibus, qualiter rerum corporalium dominia ex titulo et justâ causâ acquirendi transferuntur per traditionem. Nunc autem dicendum qualiter transferuntur sine titulo et traditione per usucaptionem scilicet per longam, continuam, et pacificam possessionem, ex diuturno tempore et sine traditione.' The discussion relating to the acquisition of things incorporeal commences (as he tells us) in chapter xxiii. I have not overlooked the passage at the end of chapter xxii., where Bracton undoubtedly speaks of easements, but only of their *possession*, which he certainly does *not* say will confer a title, and rather implies the contrary ('ita quod taliter utens sine brevi et judicio ejici non poterit').

³ Bracton, book iv. chap. xxxviii. fol. 222 b.

regards incorporeal things (so far as he treats of them), would it, I believe, be safe to affirm that Bracton's rules of prescription are identical, either with the strict Roman law, or with any modification of it, which may at any time have been known as civil law. As regards corporeal things, Bracton ignores the distinction, so important in the Roman law, and never lost sight of by the commentators upon it, between possession which is founded on a just title and possession which is not; contenting himself with the far less comprehensive requirements, that the possession must be continuous and peaceful¹. As regards the acquisition of incorporeal things, the rules of Roman law varied so greatly at different times, and so greatly also in reference to different kinds of rights, that any general statement of identity would be most hazardous. Upon the cardinal point just referred to, I very much doubt whether here again Bracton did not rather reverse than follow the Roman law. I doubt whether he was prepared to admit the acquisition by prescription of incorporeal things in any case without just title². At any rate he is not explicit on the point: whereas the Roman law did (as an exceptional case) admit such acquisition in respect of certain special rights³; and the modern English law, as I shall show presently, admits it generally. It is therefore incorrect, as it

¹ Book ii. chap. xxii. fol. 51 b. See the passage quoted above. He says expressly that ownership may be acquired *sine titulo et traditione*, which he opposes to *ex titulo et justâ causâ*.

² I do not state this positively; but it is remarkable that in the passage above referred to, where he speaks of the acquisition of the right of common of pasture, he says, 'item [acquiritur] ex longo usu sine constitutione [not sine titulo] cum pacificâ possessione [not per pacificam possessionem] continuâ et non interruptâ, ex scientiâ negligentâ et patientiâ dominorum, non dico ballivorum, quia pro traditione accipiuntur.' I take Bracton's meaning to be this:—'Common of pasture is acquired without any express intention to transfer it (see Dirksen, *Manuale Latinitatis*, s. v. *Constitutio*) by reason of long enjoyment coupled with quiet possession, continuous and uninterrupted, on account of the knowledge, negligence and endurance of the owners—not of his bailiffs, because these things stand in the place of delivery.' (See Croke's *Reports in the time of James the First*, p. 142.)

³ Digest, Book viii. art. 5. sect. 10.

seems to me, to identify the English law of prescription with the rules laid down by Bracton, or the rules laid down by Bracton with those of the Roman or civil law.

Littleton's
view of
time im-
memorial.

568. If we desire to see clearly the connexion between the Roman law and the English law in the matter of prescription as applied to *jura in re alienâ*, we must, I think, go to a writer who was of far greater authority than Bracton¹. Littleton while discoursing of tenure in burgage goes off to a discussion of customs, and from that to a discussion of prescription. He says that title by time immemorial and by prescription are all one in law, but he seems to have been in doubt whether a man could make a title by time immemorial at common law : and he states the opinion that this could be done thus :—‘*Ils ont dit que il y auxy un auter title de prescription que fuit a la common ley devant ascun estatute de limitation de briefe, &c. ; et ceo fuit, lou un custome, ou un usage, ou auter chose, ad este use de temps dont memorie des homes ne curt a le contrarie. Et ils ont dit, que il est prove per le pleder un title de prescription de custome. Il dirra que tiel custome ad este use de tempore cujus contrarium memoria hominum non existit et ceo est autant a dire quant tiel matter est plede que nul home adonque en vie ad oye oteun prooffe a le contrary ne avoit ascun conusans a le contrary.*’ This passage clearly has reference to the time immemorial of the Roman law, and it is applied by Littleton to all sorts of rights (*custome ou usage ou auter chose*).

569. Now the doubt which is here expressed by Littleton,

¹ S. 170. Coke's translation is as follows :—But they have said that there is also another title of prescription that was at the common law before any statute of limitation of writs, &c., and that it was when a custom, or usage, or other thing hath been used for time whereof mind of man runneth not to the contrary. And they have said that this is proved by the pleading, where a man will plead a title of prescription of custom. He shall say that such custom hath been used from time whereof the memory of man runneth not to the contrary, that is as much as to say, when such a matter is pleaded, that no man then alive hath heard any proof to the contrary, nor hath no knowledge to the contrary.

and which he does not resolve, as to whether in his time the party in possession could set up enjoyment from time immemorial at common law, is of no interest. It has long been resolved that in many cases he can do so¹. Three things, however, are remarkable in this passage:—(1) Littleton identifies prescription and enjoyment from time immemorial; (2) he says nothing about the presumption of a legal title; (3) he assumes that, if there is any right arising out of enjoyment from time immemorial at common law, it is the time immemorial of the Roman law, i. e. ‘that no man then alive hath heard proof to the contrary nor hath any knowledge to the contrary,’ and that it has nothing to do with the reign of Richard the First.

Remarks
on Little-
ton's view.

570. The passage I have quoted from Littleton's Tenures contains, I believe, the key of the English law on the subject of prescription as applied to the acquisition of jura in re alienâ. The English lawyers, following Littleton, have adopted time immemorial as the basis of their law. They have also (in this respect not following Littleton, but very likely acting with logical consistency) adopted the principle that time immemorial is not a mode of acquisition but only affords a presumption of legal origin. And if they had adhered to the view that time immemorial was such as Littleton described it, and as the Roman lawyers understood it, there would have been no inconsiderable protection to the party who had been in long enjoyment of a right when it was attacked. There would still have been the danger that the presumption of a legal origin might be rebutted, but this would not be easy, and the full benefit of the presumption would be acquired within a reasonable time, so long as ‘time immemorial’ meant ‘within the recollection of those living, and what they had heard from others speaking from their own recollection.’

Modifica-
tions of
Littleton's
view.

571. This protection, however, was greatly weakened by the suggestion which finds, I believe, no countenance in

¹ See the quotations in Viner's Abridgment, Prescription (M).

the earlier writers, that even when applying the common law it must be held that nothing was beyond the memory of man which had happened since the time of Richard the First¹. Only a right which had existed as long as this, was considered to be entitled to the presumption that it had a legal origin; and to prove that a right had existed so long as this was extremely difficult. I have not been able to discover when it was that the judges first attached this meaning to 'time immemorial.' It was impossible in strictness to maintain it, and later on we find that the judges assisted the person in possession by admitting a presumption that a right which had been enjoyed for a considerable period had been enjoyed from the 1 Ric. I, and they did what they could to enforce this presumption, but like all presumptions of the kind it was liable to be defeated, and in this case it was very often easily defeated. For example, if a man claimed a right of way to a house, and he rested his claim upon proof that it had been enjoyed for one hundred years, it would be defeated by showing that the house itself had not existed for more than two hundred years.

Insufficient protection of English law.

572. It is, I think, certain that at one time this defective protection was the only protection afforded by English law to persons who had been in long enjoyment of rights, but could not show how they came into existence. It was obviously not only a very slender protection, but it was dwindling away, as the time which had elapsed since the reign of Richard the First became longer. It was necessary, therefore, to seek for some better means of protection.

Modern lost grant.

573. As far as I can ascertain, it seems to have been thought that any alteration in the period of time immemorial must be made by the legislature. It was suggested by one writer that as the time for bringing a writ of right was limited to sixty years, time immemorial ought to be limited to sixty years also². The suggestion was a good one as far as

¹ Viner's Abridgment, Prescription (M).

² See Viner's Abridgment, ubi supra.

it went, but the hint was not taken by the legislature. The judges accordingly hit upon a new plan. About the end of the last century they began to tell juries that when a right had been enjoyed for twenty years they ought to presume from that alone, without any enquiry as to whether the right had lasted from time immemorial, that there had been a 'modern lost grant.' Of course juries ought to presume this, if they really believed that such a grant had been made: but this is not at all what the judges meant. They meant the jury to find that there was such a grant, *whether they believed in its existence or no*. The object was laudable, but it was a most unsatisfactory method of accomplishing it. It was asking the jury to find an obvious untruth. It was, however, more successful than one could expect, and juries generally did as they were told. If they did not, the judges had the courage—I ought perhaps to say the effrontery—to set aside the verdict *as against the evidence* ¹.

574. On the top of this clumsy, though not altogether ineffectual contrivance, came the Prescription Act, the 2 & 3 William IV. c. 71. The object of that act is declared to be to shorten the period of prescription. Strictly speaking what it does is this:—it makes the presumption of a legal origin conclusive after an enjoyment of twenty years. It does not make the prescription of the English law anything different from what it was before. It does not do away with the presumption of a legal origin. Nor does it even apply to all kinds of jura in re alienâ, but only to those mentioned in the act. The protection of other rights remains as before, and juries are still often gravely asked to

Prescription Act.

¹ See the observations on this practice in the First Report of the Real Property Commissioners, p. 51. The judgment of Lord Bowen in *Dalton v. Angus*, Law Rep. Appeal Cases, vol. vi. p. 740, seems to open the prospect of putting the presumption into a more reasonable shape. He suggests that it is no longer necessary for a jury to find that there was a modern grant which has been lost, but that it will be sufficient if they find that the enjoyment which had lasted twenty years had its origin in circumstances sufficient in law or in equity to create the right, without saying what those circumstances were.

presume that grants have been lost which no one believes ever to have existed.

To what cases the act applies.

575. The language of the act has been severely criticised, and it is certainly somewhat obscure and ill-worded, but if it can be got to operate its operation is effectual, for the presumption of a legal origin would cure defects of every description. It is, therefore, of the first importance to consider exactly when the presumption is to be made. The effect of the act combined with the previous law is, that the presumption is to be made, whenever the right claimed has been actually enjoyed without interruption for a period of twenty years, by a person 'claiming right thereto,' and who alleges and can prove that the enjoyment has been 'as of right.'

Quasi possession of jura in re.

576. In order to understand what is meant by the expressions 'claiming right thereto' and 'as of right,' which are the expressions used by the act to qualify the enjoyment, we must first consider a question which I deferred in a former chapter, namely, what is the general conception of the enjoyment or quasi-possession of a jus in re which we have in view, when we are contemplating the legal results of that condition¹?

Analogy to possession of corporeal things.

577. This is a matter which has been very fully discussed by Savigny in his Treatise on Possession, to which I have already so frequently referred². Savigny considers that the conception of the quasi-possession or enjoyment of an incorporeal thing is analogous in all respects to the conception of the possession of a corporeal thing; of which conception it is an extension³. Thus, in order that there may be quasi-possession of an easement, it is not necessary that the right should be actually exercised⁴, any more than

¹ Supra, sect. 396.

² What follows is chiefly a paraphrase of parts of sect. 46 of the Treatise on Possession. But, in order to make it more easy of comprehension, I have occasionally amplified Savigny's very condensed expressions, and inserted two or three illustrations.

³ Supra, sect. 391 sqq.

⁴ The phrase 'actually enjoyed' occurs in the 2 & 3 William IV, c. 71,

it is necessary that there should be corporal contact, in order to constitute possession of a thing corporeally existent. The physical possibility of exercising or enjoying the easement, coupled with the determination to exercise and enjoy it on one's own behalf, constitutes quasi-possession, just as a similar combination of physical and mental elements constitutes possession of land or goods. Neither the physical possibility of enjoyment, nor the actual enjoyment, will alone constitute quasi-possession. I may walk across your land whenever I like to pay you a visit, or to transact business with you at your house, but I am still not in quasi-possession of any easement in the nature of a way across your land. In walking across your land I am only using the means, which all owners of houses provide for their friends and neighbours, of obtaining ready access to them as occasion may require: should you lock the gate, I should not feel that I had anything to complain of, and should not attempt to force my way in. To use the exact expression of Savigny, to constitute quasi-possession of an easement, it is not sufficient that there should be an exercise or enjoyment of it which is merely *de facto*, or accidental, it must be as of right (*tanquam suo jure*); and there must be not only the permission, but the *submission* (*patientia*) of the person upon whose land the easement is exercised or enjoyed. So, on the other hand, if my neighbour grants me a way across his field, and consequently removes from his gate a lock which has hitherto prevented my using it, and informs me that the road is at my service, I am just as completely in possession of the way by such a ceremony, as if, in assertion of my right, I actually walked along the road in question.

578. In the case of positive easements, that is to say, Positive and negative easements. easements which consist in doing something upon your neighbour's land, there is not much difficulty in deter-

but it is obvious that an easement may be enjoyed even when it is not being exercised.

mining whether or no the circumstances constitute quasi-possession of them; and the distinction above pointed out between the mere *de facto* exercise or enjoyment, and exercise or enjoyment as of right, has always been recognised with tolerable clearness. But the quasi-possession of negative easements, that is, of easements which consist in your neighbour abstaining from doing something on his land—of which the easement that he should not build so as to obstruct the passage of light is the most frequent example—is far more difficult to comprehend, and has not been so well understood. Savigny has discussed the quasi-possession of negative easements very fully, and he points out, first, that we must carefully distinguish between acquiring the right itself, and acquiring the quasi-possession of the easement, which may be with or without the right; just as we may acquire possession of land with or without acquiring the right to possession, or ownership. For acquiring the right a simple grant is sufficient: but suppose two strangers to be adjoining owners, how does one of them get into quasi-possession of negative easements over the land of the other? That is the question to be solved.

Enjoy-
ment 'as
of right.'

579. One case of acquisition (he says) of the possession of this kind of easement is undisputed; namely, when the act, which is opposed to the servitude, is actually attempted by the owner of the servient land, but prevented; whether by the simple protest of the owner of the dominant land, by force, or by the decree of a court of justice. As, for instance, if I claim as an easement the uninterrupted flow of a stream issuing from a spring in your land, I should clearly be in possession of it, if, upon your damming up the stream before it left your land, I complained to you, and you thereupon re-opened it; or if I myself cut the dam, which act you did not resent; or if I obtained an order of court, that it should be re-opened. Where no such actual attempt to do the act, which is opposed to the easement, is made and prevented, some persons have main-

tained that, in order to put the owner of the dominant land in possession of the easement, a pretence must be made by the owner of the servient land of doing the act opposed to the easement—as, for instance, a pretence of damming up the stream by throwing in a few shovelfuls of earth—to be followed by formal opposition on the part of the dominant owner, and that again by a pretended submission on the part of the servient owner. Savigny protests strongly, as he always does, against this sort of symbolical action, which he considers as unsuitable to the idea of possession, as it is undoubtedly unknown in practice. Others hold an exactly opposite opinion, which Savigny himself at one time shared; maintaining, that the simple omission by the servient owner to do any act opposed to the enjoyment of the easement, puts the dominant owner in possession of it¹. But this leads at once to the conclusion, which Savigny, with good reason, declares to be nothing less than monstrous, that every land-owner is in legal possession, and entitled to all the advantages which result from such possession, of numberless easements, as against all his neighbours; so that, for instance, the moment a man builds a house, he is, not of course entitled to, but in possession of, and (as it were) on the road to acquire by enjoyment, an easement which prevents all his neighbours from building within a certain distance of him. The error of the latter opinion consists in this: that it loses sight of that which is so important, when we are considering what constitutes quasi-possession in a legal sense; namely, that it is founded, not upon every enjoyment or exercise of the easement, but only upon an enjoyment or exercise of it *as of right*; not upon the mere inaction of the other party, but on his submission (*patientia*) to necessity. Anything

¹ I have not been able to refer to the earlier editions of Savigny's Treatise on Possession, but he states in a note to the subsequent editions, that he was at first one of those who thought that the mere inaction of the servient owner put the dominant owner in possession, in a legal sense, of any negative servitude which the dominant owner *de facto* enjoyed. See p. 493.

which establishes that the exercise or enjoyment is of this character, and not merely *de facto* or accidental, is sufficient to establish quasi-possession in a legal sense. This is clear enough in the undisputed case mentioned above, where there has been an actual attempt to do the act opposed to the easement, followed by a protest submitted to or enforced. So, where the right itself has been granted, no formal or symbolical induction into the exercise or enjoyment of easement is necessary. The exercise or enjoyment of the easement and the passiveness of the other party are now, not merely *de facto* or accidental, but directly referable to the right, which has been acquired by grant.

Coincidence of expressions in Prescription Act.

580. It is certainly not a little remarkable that Lord Tenterden, who has generally been supposed to have drawn the Prescription Act, and who does not usually evince any very strong desire to adopt the strict and accurate technical language of the Roman law, should have chosen almost exactly the expression which Savigny, against much opposition and after a considerable change in his own opinions, has fixed upon, in order to characterise that kind of enjoyment of a right which leads to its acquisition. I do not think there can be any doubt that the Prescription Act is here identical with the Roman law, from which the expression was borrowed either by Lord Tenterden, or some one of his predecessors; for, I think, the expression had been used on the English Bench before¹.

Easement of light.

581. There is one easement which the Prescription Act allows to be acquired in a different way from all other easements². This is the easement of light. As to this easement

¹ Lord Wensleydale treats the words of section 5, 'as of right,' as conveying the true meaning of the legislature. See the case of Bright against Walker, Crompton, Meeson and Roscoe, Reports, vol. i. p. 219; Gale on Easements, p. 128. But the two phrases together show clearly that what is meant is *tanquam sui juris*.

² It might have been possible to argue that, as section 5 of the act is general in its terms, the words 'as of right' in this section apply to the easement of light as well as other easements. But, I think, it is agreed that these words in sect. 5 must be read as explanatory of the words

the act says that it may be acquired by actual enjoyment simply, the qualifying words 'by a person claiming right thereto' not being added. There is no doubt that the intention was to give to the mere *de facto* and accidental enjoyment of light for twenty years the benefit which in other cases is only conferred upon enjoyment as of right. We have seen how nearly the desire to render the enjoyment of light under similar circumstances continuous and secure, had perverted the interpretation of the Roman law on the general question of acquisition of negative servitudes¹. The obvious cause of the proneness to error on this point is, that the ordinary law of prescription is not suited to the circumstances of that particular easement; questions as to which generally arise where habitations are closely packed, and where the respective parties stand to each other in special and exceptional relations. Most European countries have dealt with the subject in a similarly exceptional manner, only this has been done avowedly; whilst we have caused a good deal of confusion by so long a struggle to meet the difficulty by the application of general principles².

But all necessity for straining the law for this purpose in England is avoided by the framers of the Prescription Act having made a special provision to meet this case. The

'claiming right thereto' in sect. 3, and that they have no application to the easement of light.

¹ *Supra*, section 579.

² The distinctly exceptional character of this provision was, I believe, first pointed out by Mr. Justice Willes, in the case of *Webb against Bird*, where the owner of a windmill claimed, as an easement appurtenant to his mill, the free and uninterrupted passage of air. The case is reported in the tenth volume of the Common Bench Reports, New Series; see pp. 284, 285, and exactly accords with the conclusions of Savigny as to the acquisition of the possession of negative easements. Probably, however, the decision in *Dalton against Angus*, Law Reports, Appeal Cases, vol. vi. p. 740, is fatal to any attempt to introduce the distinction between inaction and submission into the English law. But I cannot help feeling surprise that any one should maintain that it is reasonable or desirable that when my neighbour builds a house near to me I should have to cut away the soil so as just to let his house fall down, on peril of losing my right to excavate my own land, should I find it necessary to do so.

provision was at first rather misunderstood, but all difficulty has disappeared since it has been recognised that it is one of this exceptional kind.

Enjoy-
ment must
be peace-
able and
open.

582. English judges, besides requiring that enjoyment of an easement in order to give rise to the presumption of a legal origin must be as of right, have also held that it must be peaceable and open. In requiring these conditions they are probably wise. The words 'peaceable' and 'open' correspond to two expressions of the Roman law, which required that possession should be *nec vi nec clam*. I do not think it worth while for an English lawyer to examine very accurately the meaning of these expressions in the Roman law, for this part of the Roman law, though it may have given a hint to our judges, has not served them as a model, nor do I think it could be made to do so without a radical change in our views as to prescription. Expressions to the effect that the enjoyment is to be open and peaceable have long been used by English lawyers and this requirement is now well established. But it is not to be found in the Prescription Act. And the judges, I venture to think, have gone entirely wrong, in endeavouring to discover it in the words 'as of right' or the analogous words 'claiming right thereto.' This construction of the act would lead to great confusion. We must never forget Savigny's caution, not to confound the acquirement of the title to the right with the acquirement of the possession of it¹; and I think this caution is forgotten when we find these words 'as of right' interpreted, as Lord Wensleydale seems desirous to interpret them, as if they meant 'rightfully.'² I do not think it has ever been doubted that the acquisition of rights may commence in the English law with an act which is a pure trespass; and that the enjoyment may continue to be a trespass until by prescription it has grown into a right. It would have been impossible to

¹ Sav. Poss., sect. 46, p. 492.

² See the case in Crompton, Meeson and Roscoe's Reports, vol. i. p. 219; Gale on Easements, p. 128.

apply the statute to half the cases to which it has been applied, if such a trespasser could not in the view of the English law enjoy as of right. To exchange the necessary and (if I may use the expression) scientific interpretation of the phrase 'as of right' for that which Lord Wensleydale suggests, would throw the law into the greatest possible confusion; and it is a sufficient answer to the attempt to use the language of the act for this purpose, to say that it has already been appropriated to another, and an inconsistent one. We must, therefore, treat the conditions which require the enjoyment to be peaceable and open as introduced upon the authority of judicial decision; a stretch of power at which, after what has happened on other occasions, we need not be very much alarmed.

It is desirable to observe that, if the view which I take of the general conception of the quasi-possession of a right in the nature of an easement, and of the conditions which are necessary to the acquisition of the right, be correct, these conditions will apply not only to the easements specified in the act but to all easements, and also to all jura in re which can be acquired by prescription.

583. I have explained above what is meant by derivative possession. There may be derivative possession of a thing which belongs to another, or there may be derivative quasi-possession or enjoyment of a right over a thing which belongs to another. Thus, if the owner of Whiteacre grants to the owner of Blackacre a right of way over Whiteacre for a fixed period of twenty years, the grantee by using the way takes full quasi-possession of the right, and enjoys it as of right. He can also during the twenty years assert his right against the grantor, and under most systems of jurisprudence (perhaps also under our own) against all the world besides. But he cannot use this possession for the purpose of gaining the benefit of the Prescription Act, or for any other like purpose. The true and only reason of this is that his possession, like that of the pledgee, is derivative.

Condi-
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Derivative
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does not
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now considering are never conferred by derivative possession, either in the way of true prescription or by way of enjoyment from time immemorial, or on any similar principle. It is also desirable to observe that this is a wholly different case from that of a person who enjoys something merely under a permission which may be at any moment withdrawn. Such an enjoyment likewise fails to produce the benefits we are considering, but for a different reason. A person who enjoys a thing by permission is not in possession of the thing in a legal sense at all. The *de facto* enjoyment produces no legal results. The tradesman who for twenty years opens my gate and walks up to my door is never in possession of an easement in the nature of a right of way. The grantee of the way in the case previously put is, as I have said, in possession of it, and as of right, but only derivatively so. Both, therefore, are excluded from prescription, but for entirely different reasons. Though, therefore, Lord Wensleydale was undoubtedly right when, in a well-known case, he treated both these persons as excluded from the benefit of the Prescription Act, he was, I think, wrong if he meant to assert that they were both excluded upon the same principle.

Excep-
tions.

Pledgee of
land in
possession.

584. I may further illustrate the general truth of the principles above stated by referring to the cases in which they have been really or apparently departed from. Thus where land is given in pledge, and the pledgee takes possession, by the English statute the ownership of the pledgor is in some cases¹ extinguished, and he can take no proceedings to recover the land of which he has given up possession. Practically also the land is transferred to the pledgee. Now the pledgee's possession being derivative, it ought never, according to the principles above stated, to operate in his favour. But possession which was once derivative may have ceased to be so. If the pledgor has

¹ See 3 & 4 William IV. chap. xxvii. section 28. This section describes the position of the pledgee as it really is, and not as it is called in our clumsy law language.

not manifested for a very long period any intention to redeem the land, it is not unreasonable to presume that the pledgee has taken to the land in lieu of the debt; that he has ceased to hold derivatively, and has determined to hold on his own behalf. We know that a derivative possessor cannot always do this; he cannot change at will the character of his possession from derivative possession to possession on his own behalf as owner. But this is a special protection given to persons who part with the possession of their property to others, retaining the ownership: and there is ample reason for not extending this protection to cases where persons are so inactive in regard to their own interests as in the case under consideration.

585. So in the provisions¹ as to what are called tenancies at will and tenancies from year to year, where there has been no payment of rent, or it has ceased. The result of these provisions is, that a period of dispossession which eventually bars the remedy and extinguishes the title, commences at the end of the first year of the tenancy, or if rent be paid, at the last time when the rent was received. Now the possession of a tenant in such a case would be at least derivative, and perhaps representative; and, therefore, it is contrary to the rule we have laid down, that the statute should, in any case, operate for his benefit. And we know how jealously the English law in most cases applies this rule to tenants and refuses to allow that either a representative or a derivative possessor can change possession which acknowledges the title of another into possession which is adverse. But by a special provision a tenant at will who has held for twenty years without payment of rent and without giving any acknowledgment to the owner of his title may allege that he has held during this period, not for the owner who let him into possession, but for himself, and claim the same benefit as any other holder for a similar period, whose possession has been adverse².

Tenancies
at will and
where
payment
of rent has
ceased.

¹ See 3 & 4 William IV. chap. xxvii. sections 7 and 8.

² It is convenient to continue the use of the word 'adverse' to describe

Indian
law of pre-
scription.

586. Substantially the same principles as those which have been adopted in the English law of prescription are recognised in the Indian statutes. The period which brings the statute into operation is in India generally measured from a date which is described as that 'when the dispossession occurs ¹.' No suit can generally be brought to recover any property except within so many years after that date. No further technical definition of this date is given, as in the English statute, but it is obvious that the cases in which the statute affects *ownership* are those in which there has been, or might be, a dispute as to *possession*; and the position of hostility thus implied requires that the party in possession should hold, not for, but against the other; should hold also as owner, and not derivatively; not consistently with the ownership of the other, but adversely. And, if a person has been in possession, thus adversely, of land or moveables for the necessary period, and the means of recovering them by any other person are taken away, it is considered by the Privy Council, though it is not so expressed in the law, that the ownership follows the possession ². Thus we have in India true prescriptive ownership of land, based not upon legislation but upon judicial decision.

587. Certain rules relating to the acquisition by prescription of rights over land other than ownership have been introduced into an act recently passed by the Indian Legislature. These rules expressly provide that easements both positive and negative may be gained by enjoyment which is peaceable, and open, and as of right, but they make the dis-

the position of a person whose possession is not derivative, notwithstanding the somewhat unfortunate history of that word in English law. Prior to the passing of the statutes of William the Fourth, a doctrine of adverse possession had been set up which the ablest lawyers declared to be unintelligible, and one of the main objects of these statutes was to sweep away this unintelligible doctrine. But there is no impropriety in now using the word 'adverse' in what appears to be its natural meaning.

¹ Act ix. of 1871, Sched.

² See Moore's Indian Appeals, vol. xi. p. 361.

tion that the enjoyment of the easements of light and air is not required to be open¹.

588. I do not think that the English law of prescription will ever be put upon a satisfactory footing until the notion is got rid of that all prescription presumes a grant, and until prescription is recognised here, as on the continent of Europe, as a means of acquiring ownership. This grant is only a fiction, and the fiction here is not a useful one. It does not indicate the principles to be applied. The relation of the owner of the servient tenement to the person who has the right over it is not really that of grantor and grantee, nor is it analogous to that of grantor and grantee. And though I think that fictions are useful and may be defended in the hands of lawyers, I consider it indefensible to place them before a jury.

Suggested
improve-
ment in
English
law.

589. Probably the best thing that could now happen to the English law of prescription would be that it should be wholly recast by the legislature, acknowledging in the first place, in the case of both ownership and jura in re alienâ, that they could be acquired by possession for a certain time: and that the title so acquired was just as good in all respects as a title by conveyance from the owner. This possession must, of course, be as of right, and it would also be necessary to consider what defects in the possession besides actual fraud should stand in the way of acquisition. And, at this point, it is probable that our law, especially as regards the acquisition of land, would require some substantial modification. It is hardly likely that on such a point we should be right and all the rest of the world wrong. And if it were decided that some defects in possession should be a bar to the ordinary prescription, a longer period might be named after which even this defective possession might be considered sufficient for a title².

¹ The easement of access of air is not mentioned in the English Prescription Act, but it is so in the Indian Act (Act xv. of 1877).

² Even in a system so little advanced as the ancient Hindoo law the advantages of a 'just title' are recognised. The Mitaeshara lawyers would allow a right to be gained in twenty years, but only if the party

Time immemorial might, I think, pass unnoticed. Not that it would be thereby abolished; for it still might and would give rise to a presumption of a legal origin, but only a presumption of which the judge or jury (whichever had to decide the question of fact) would form an opinion¹.

590. There are other rights besides ownership and *jura in re alienâ* to which prescription can be applied. The Roman law applied it to marriage: and it is applied to such rights as to take toll, or hold a market. I have selected ownership and *jura in re alienâ* for discussion because of their importance, and because they best illustrate the principles of prescription as understood by English lawyers.

591. I follow the ordinary use of language, when I say that rights may be gained or lost by lapse of time, but it must be borne in mind how far that expression is correct. Of course what creates or destroys the right is the sovereign authority alone, which is the source of all rights as well as of all obligations: and lapse of time together with other circumstances are only the prearranged conditions which give rise to ownership. For instance, when a man gains by prescription the right to take toll from all persons passing over a certain bridge, what really happens is that, after he has collected toll for a certain number of years, the courts of law, exercising delegated sovereign authority, will recognise his right to do so. But generally, other circumstances must combine. He must have collected the toll as of right. It must not be on a bridge which forms part of the street of

already held under a title which though defective was just. See Mitashara, chap. 3, § 3, Of the Effect of Possession. Jaganatha, a more recent author, says that in three generations, which he reckons at sixty years, quiet enjoyment without just title would give the ownership. What he says seems to imply that the period would be shortened in favour of a person holding under a just title. Book v. vv. 395, 396.

¹ Bentham (vol. i. of *Collected Works*, p. 327) has committed himself to the opinion that no time however long ought to give a title where the possession is dishonestly obtained. His observations are rather rhetorical, and I am not sure he has not lost sight of his own principle of utility, in laying down so sweeping a proposition.

a town. If it is in a public thoroughfare the claimant must show that he has always kept the bridge in repair ; or whatever else may be the restrictions which the sovereign authority thinks fit to impose on the acquisition of the right. When, therefore, we say rights are gained or lost by lapse of time, we only use a convenient and compendious expression which fixes our attention on that part of the matter which we wish to bring into prominence.

CHAPTER XIV.

LIABILITY¹.

Primary
and se-
condary
duties.

592. EVERY person is under the law subject to a great variety of duties to do or to abstain from doing certain things. The nature of some of these duties has been carefully defined by the law, as for example in the case of the duties of a parent in regard to his child. In other cases the law has not fully defined the duties to be performed, but has left the definition of them in a measure to the parties concerned: as for example in the case of trustees, or the directors of a railway company. In a third class of cases, such as those duties which arise out of contract and other ordinary transactions of daily life, it is left almost entirely to the parties concerned to determine them as they please, the law merely enforcing them.

¹ An Analysis of Criminal Liability has been published by Professor Clark (Cambridge, 1880), to which I refer the reader for a full and able discussion of the principles here stated. Mr. J. H. Wigmore has traced in a series of interesting articles the gradual development of liability in English law from the earliest stages, in which it is enough for the courts that an act had been done which caused damage either wilfully or by misadventure (and then scarcely distinguishable), down to the present time, when even wilfulness is not a ground of liability unless the doer either denies or culpably disregards the consequences of his act. See *Harvard Law Review*, vol. vii. pp. 315, 383, 441.

593. These are all what are called primary duties: we are told what we are to do without any consideration of what follows if the duty is not performed: that we are told separately; and forms what is called a secondary or sanctioning duty.

593a. But there is also a large number of cases in which no attempt is made by the law to determine the primary duties, otherwise than by determining what constitutes a breach of them, and what secondary duty follows thereon¹. Primary duties not always defined.

594. It is quite possible that for practical purposes it may come to the same thing whether the law determines the duty or the breach of it: and probably if the breach of duty were defined in all cases as accurately as (say) the crime of theft in the Indian Penal Code, there would be no reason to complain of the obscurity of the law. But this is very far from being the case. And it is precisely in that class of cases where the primary duty to do or abstain from doing has not been discussed, and where lawyers have fixed their attention on the breach of duty and the secondary or sanctioning duty which arises thereon, that we find the greatest obscurity. Secondary duties also not always defined clearly.

595. The word 'liability' is used to describe the condition of a person who has a duty to perform, whether that duty be a primary one or a secondary or sanctioning one. Thus we speak of the liability of a trustee—to perform the duties of his trust: of a contractor—to perform his contract: of one who has broken his contract—to pay damages. Liability.

596. We frequently come across the expression 'liability ex contractu.' This signifies the condition of a person who is under the primary duty to perform a contract. If he fails to do so he comes under another liability—namely, under a duty to make compensation. Ex contractu.

597. Another expression we frequently meet with is 'liability ex delicto.' Here the matter is taken up at a different stage. This expression signifies the condition of a person who has already committed a breach of a primary Ex delicto.

¹ See *supra*, sect. 197.

duty, and who is under a duty to make compensation to the party injured by his default.

Torts.

598. The breach of duty itself which gives rise to the liability *ex delicto* is called a 'tort.' We have no name for, still less any description of, the primary duty which has been violated. It is not easy to say what breaches of duty are comprehended under the word 'tort.' The word itself conveys nothing more than that something is done which is legally wrong. But every breach of a legal duty is a legal wrong, and there are many such wrongs to which the word 'tort' is never applied. For example, we should never call a breach of contract a tort; nor a breach of duty by a trustee; nor the omission of a person who has used a ferry to pay the toll. Indeed I think it may be said that the word 'tort' is never used to describe the breach of a primary duty, if that duty has been itself described with any degree of definiteness.

Civil injuries and crimes.

599. Liability is not unfrequently divided into civil and criminal liability. This classification of liability is not based upon any distinction in the nature of the two kinds of liability, but upon a difference in the tribunal in which the party liable is proceeded against. If the court where the party is proceeded against be what is called a criminal court, or court of criminal jurisdiction, the liability is considered to be criminal, and the breach of duty is called a crime or an offence. If the court in which the proceedings are taken be a civil court, or court of civil jurisdiction, the liability is considered to be civil, and the breach of duty is called a civil injury. But there are some courts which exercise both jurisdictions, and there is then some difficulty in distinguishing criminal and civil liability. By long habit we have come to consider certain kinds of personal violence, certain breaches of the laws which protect property, and certain kinds of fraud to be crimes. But where there is no such tradition, as, for example, in the case of the refusal of a father to support his bastard child, it has been found

very difficult to determine whether or no the breach of duty is a crime. The French law draws the line between civil and criminal liability by means of the Code. Civil injuries are those breaches of duty which are dealt with by the Code Civil. Offences are those breaches of duty which are dealt with by the Code Pénal. Offences are divided into 'crimes' (specially so-called), 'délits' (using in a narrower sense the same word as is used to describe a certain class of civil injuries), and 'contraventions de police'; the latter class containing a good many matters which we should bring under civil liability.

600. Whilst too we find that in modern times the division between civil injuries and crimes is fluctuating and uncertain, we observe that in the earlier stages of society, if it existed at all, it was based on entirely different notions¹. To exact for all injuries both to person and property a payment in money to the person injured appears to have been the first form of *legal* liability for injuries to private persons alike in Greece, in Rome, and among the Teutonic tribes. The first idea of criminal law, as distinguished from this, seems to have grown out of the punishment by the sovereign authority of offences directly against itself. And the impulse to the more general development of criminal liability in later times seems to have been due, in this country, to an extension of this last notion. It is supposed, by rather an odd fiction, that by every offence the 'King's peace' is disturbed, and his 'dignity' offended. And it was formerly necessary in all cases that it should be so stated in the indictment; not only where acts of violence had been committed, but even where the offence charged was such as obtaining goods by false pretences, or selling ale on a Sunday. Modern writers still attempt to preserve a somewhat similar notion, when they tell us that civil injuries are infringements of rights belonging to individuals considered as individuals; whereas crimes are breaches of public rights and duties belonging to the whole

Origin of
distinction
between
civil in-
juries and
crimes.

¹ Maine's Ancient Law, ch. x.; Kemble's Saxons in England, Bk. i. ch. x.

community¹. However, the examples given above sufficiently show that this distinction is not adhered to.

601. Sometimes the mental consciousness of wrong on the part of the person who does the act appears to be made the test of criminality. We are often told that in order to commit a crime a person must have a guilty mind. No doubt too there has been a readiness to bring all acts, which are in the general estimation of mankind *wicked*, within the criminal law. But a very slight experiment will show that neither is this a test which has been consistently applied to distinguish civil injuries from crimes².

Nature of
duties and
obliga-
tions not
dependent
on the
occasion of
their crea-
tion.

602. It must always be remembered that whatever names we give to duties, or to breaches of duties, or to the consequences arising therefrom, these names only refer to the occasion on which the duties come into existence, and to the mode in which they are enforced, and have nothing whatever to do with the nature of the duty itself, which is the creature of the sovereign power. For instance, the duty I am under to abstain from acts which would interfere with the enjoyment of your property may arise upon an express contract between you and me, or may depend, without any contract, solely on your right of ownership. Certain rights with their corresponding duties do, indeed, for the most part arise upon contract; certain other rights with their corresponding duties do, as it so happens, for the most part arise independently of contract. Breaches also of duties which are the subject of civil procedure are, as a fact, generally followed immediately by consequences of one kind; whilst breaches of duties which are the subject of criminal procedure are, as a fact, generally followed immediately by consequences of another kind. But there is nothing in this which is either necessary, or even constant. There is hardly

¹ Blackstone's Commentaries, vol. iv. p. 5; quoted in Broom's Commentaries, p. 869 (1st ed.).

² See Russell on Crimes, vol. i., whence it appears that an indictment will lie for neglecting to forward an election writ (ch. xvii.), and for removing a dead body, however innocently (ch. xxxvii.).

any duty usually arising upon contract which might not arise independently of it ; and a very large number of rights, with their corresponding duties, arise partly upon contract, and partly not ; indeed, we have seen how the attempt to discriminate between duties by the occasion which creates them has completely failed. So we shall see hereafter that the consequences of all breaches of duty are in a great measure ultimately the same, whether their consequences be

. . . civilly or criminally pursued.

CHAPTER XV.

LIABILITY UPON CONTRACT.

Concep-
tion of
contract.

603. In order to understand liability upon contract we must try and understand what is meant by a contract. Contracts clearly belong to that class of acts which give rise to legal rights and duties upon occasions when the parties themselves have agreed so to declare their intention. The declaration of intention does not create the rights or duties; that can only be done by the sovereign authority, but it is the occasion of their being created: and it is the very object of the declaration that these rights and duties should arise. I have already made some general observations upon declarations of intention which are, of course, applicable to contracts¹.

604. In endeavouring to discover what is meant by 'contract,' I shall make use of the inquiry into the meaning of the term contained in Savigny's System of Modern Roman Law², of which the following is a paraphrase.

Savigny's
definition
of con-
tract.

605. 'The idea of contract (says Savigny) is familiar to all, even to those who are strangers to the science of law. But with lawyers it is so frequently brought into play, and

¹ Sect. 241.

² Sect. 140.

is so indispensable by reason of the frequency with which they have to apply it, that one might expect from them an unusually clear and precise conception of it. But in this we are not a little disappointed.

606. 'I will try (he says) to show what a contract is, by the analysis of a case which no one can doubt is one of true contract. If then with this view we consider the contract of sale, the first thing that strikes us is several persons in presence of each other. In this particular case, as in most, there are precisely two persons; but, frequently, as in a contract of partnership, the number is quite uncertain; so that we must adhere to plurality in this general and indeterminate form, as a characteristic of contract. These several persons must all have come to some determination, and to the same determination; for, so long as there is any indetermination, or want of agreement, there can be no contract. This agreement must also be disclosed; that is, the wishes of each must be stated by, and to each, until all are known; for a resolution which has been simply taken and not disclosed will not serve as the basis of contract.

607. 'Moreover, we must not neglect to observe the object which is aimed at. If two men were to agree to assist each other reciprocally, by example or advice, in the pursuit of virtue, science, or art, it would be a very odd use of the term to call this a contract. The difference between such cases and the contract of sale, which we have selected as the type, is this: In the latter, the object which the parties have in view is a legal relation; whereas in the former, the objects are of quite another kind. But simply to say, that the object which the parties to a contract have in view is a legal relation, does not go to the root of the distinction. When the judges of a court of law after a long discussion agree upon a decree, we have every one of the characteristics hitherto noted, and it is a legal relation that the decision has in view; but yet there is no contract. The bottom of the distinction is, that the judges have before them a legal

relation to which they are no parties. In the case of a contract of sale the legal relation which the parties contemplate is their own.

608. 'These characteristics may be summed up in the following definition :—A contract is the concurrence of several persons in a declaration of intention whereby their legal relations are determined.'

English definitions of contract.

609. It will be observed that this definition of contract includes not only those agreements which are a promise to do, or to forbear from, some future act, but those also which are carried out simultaneously with the intention of the parties being declared. English writers are not very clear upon this point. While on the one hand they would seem in practice to treat as contracts only those agreements which legally bind us to do, or to forbear, at some future time ; yet we find, on the other hand, that in their definitions of contract they generally take the widest possible ground, rejecting all the limitations suggested by Savigny, and making, in fact, the two words 'contract' and 'agreement' synonymous.

Distinction between contract and performance of a contract.

610. From some expressions in passages subsequent to that which I have quoted, I gather that Savigny intended to treat the performance of a contract as itself a contract. Thus, if I rightly understand him, he says that the agreement for the sale and purchase of a house is one contract, and the consequent delivery of possession by the vendor to the purchaser is another. This, with deference to so great an authority, I venture to doubt. I think there is here a confusion which is exceedingly common between contract and transfer or conveyance, such as Austin has several times pointed out in the course of his Lectures¹.

611. Subject to this modification (and for our present purpose it is not an important one) I think that Savigny's analysis of contract may safely be adopted. The essential distinction between it, and the definition current in those

¹ See Lecture xiv. and the notes to Table II, pp. 387, 1005 (3rd ed.).

countries which have adopted the Code Napoleon, is this: Savigny defines contract solely with reference to the contemplation of the parties: if the parties intend to declare their legal rights *inter se*, he calls it a contract; whether or no it has the effect intended is not considered¹. The Code Napoleon, on the other hand, makes it of the essence of the definition of contract that an 'obligation' is thereby created. For instance, if I were to promise a voter ten pounds for his vote, that would be a contract according to Savigny; but, as no legal obligation would result from it, it would not be a contract according to the definition of the French Code. The definition of contract in the Italian Code nearly accords with that of Savigny's definition².

612. English lawyers have not made any very distinct effort to define contract authoritatively. Several writers have given us a very careful analysis and explanation of agreement, and this is no doubt a useful step in understanding the nature of contract. But we have still to ascertain what agreements are contracts, for I believe every one admits that all agreements are not so. English definitions of contract.

613. Some persons, after having defined an agreement, go on to tell us that a contract is an agreement 'enforceable' at law³. This, as I understand it, restricts the word contract to those agreements which the party making the promise can be compelled by law to perform. This is not unlike what is said by the French Code: but it leaves the definition of contract very vague, because no guide whatever is given as to what agreements, or what classes of agreements, are enforceable at law. Moreover English lawyers do not hesitate to apply the word contract to agreements which are declared to be void⁴.

¹ I gather this from the general tenor of Savigny's observations, and, I think, it is also implied in, though not expressly affirmed by, the definition.

² Codice Civile, art. 1098. If we could find a definition which would save us from the necessity of calling things contracts which were not contracts, it would be convenient. But this has not been done.

³ This is the language of the Indian Contract Act.

⁴ Order xix of the High Court, Rules 15 and 20.

Advantages of Savigny's definition.

614. The conception of contract as set forth by Savigny does not solve all the difficulties about contract: but it appears to me to have this advantage, that it calls attention to a point which English lawyers have rather lost sight of. It reminds us that the agreement in order to become a contract must be one in which the parties contemplate the creation of a legal relation between themselves.

Agreements do not always contemplate a legal relation.

615. That there are agreements which will be considered not to be contracts because this legal relation is not contemplated is, I think, abundantly clear. Suppose, for example, that two friends *A* and *B* agree to walk together at a definite time and in a definite direction, no one would say that this is a contract, and yet it is clearly an agreement, and there is also a consideration for the promise of each. The reason, and the only reason, why it is not a contract is, as far as I am aware, that the parties, presumably, do not contemplate a legal relation.

616. Another advantage of Savigny's definition of contract is that it clearly describes the true relation of the parties, and how it arises. It arises because there has been between the parties a transaction having reference to their legal rights, for which we have no special name, but which the Germans call '*Rechtsgeschäft*,' and the French call '*acte juridique*.' The expression '*enforceable agreement*' seems to me too narrow. There are cases in which parties come to an agreement as to their legal relations, which cannot be enforced as such, but which nevertheless have important legal consequences. If, for example, an infant agrees to make a purchase, this agreement cannot be enforced: but, if the property is transferred and the price paid, the transaction holds good. This is because of the previous agreement, which has, therefore, important legal consequences, and is rightly called a contract.

617. I have already said that I would keep clear the distinction between the fulfilment of a contract and the contract itself. Nor do I think there is any difficulty in this. When after the parties have agreed upon the terms of a sale

the buyer delivers the goods and the seller receives them, each contemplates a change in his own legal position, but there is no new agreement. The transaction by which the property is transferred is a legal one, but every legal transaction between individuals is not a contract.

618. But it may be said that every sale is a contract, and yet upon a sale for ready money where the goods are delivered immediately and the price paid, the transaction cannot be separated into two parts, one of contract and the other of conveyance, and that in this case, at any rate, contract and conveyance are identical. But I do not think that this is necessarily the case. Rather, I think, the words and gestures used have served a double purpose; that of expressing an agreement between the parties, and that of transferring the ownership of the goods and the price.

619. Upon the whole, with the qualification that the fulfilment of a contract is not itself a contract, I should accept Savigny's view that every concurrent declaration of parties as to their legal relations is a contract.

620. A contract is a manifestation of intention, and the same difficulty arises in contract as in all other manifestations of intention when in case of dispute we have to ascertain what the intention really was. We can only infer intention from acts, and whether we make this inference by the aid of artificial rules, or without them, we shall inevitably in some cases attribute intention wrongly. This is a difficulty which is inherent in all inquiries into disputed facts. In acts of which the very object is manifestation of intention, if the parties are careful, the difficulty is not, under ordinary circumstances, very great. But from the slovenly mode in which parties to a contract, in the hurry of business or from carelessness, frequently express themselves, great difficulties often arise in ascertaining what legal relation the parties intended to create.

Difficulty of ascertaining intention.

Intention of parties to contract.

621. It is with reference to this inquiry that it is said, 'the intention of the parties governs the contract.' But the

difficulty of ascertaining the intention still remains. The person to whom the promise is made, or promisee, as he is called, may say that he expected one thing, and the promiser may say that he intended another. In which sense is the promise to be taken? Paley discussing this question says: 'It is not the sense in which the promiser actually intended it, that always governs the interpretation of an equivocal promise; because, at that rate, you might excite expectations which you never meant, nor would be obliged to satisfy. Much less is it the sense in which the promisee actually received the promise; for, according to that rule, you might be drawn into engagements you never designed to undertake. It must, therefore, be the sense (for there is no other remaining) in which the promiser believed that the promisee accepted his promise¹.' Austin², remarking on this passage of Paley, says that if this rule be adopted, should the promiser misapprehend the sense in which the promisee accepted the promise, either the promisee will be disappointed, or he will get more than he expects: and he suggests that the true guide is the understanding of both parties. Paley's two first propositions are undoubtedly correct. Austin's criticism, however, on what Paley considers as the only other possible alternative, is, as undoubtedly, sound. But with the greatest respect for so high an authority, it appears to me that Austin, in his own suggestion, merely falls back on the old difficulty; for the difficulty only arises when the parties aver that they understood the promise in different ways, which in every equivocal promise is, of course, possible.

How
ascertained in
practice.

622. The practical solution of the difficulty is, I think, simple enough. Austin rightly points out that there is a distinction between the intention of the parties and the sense of the promise, and it is the sense of the promise rather

¹ Paley, *Moral Philosophy*, book iii. part i. chap. v. See Archbishop Whately's note, in which I find he arrives at the same conclusion as I do, namely, that the result of a promise may be different from what either party expected.

² Lect. xxi., note, *ad finem*.

than the intention of the parties which governs the contract. Of course the sense of the promise may be different to different persons; the promiser may consider that his words bear one sense, the promisee may consider that they bear another; and a stranger may consider that they bear a third. But the judge, who has to decide what legal obligation has resulted from the transaction, determines what the sense is. And in doing this he may fairly use the assertions of the parties themselves as a guide to his own conclusion. Having first ascertained the terms in which the parties expressed themselves, he may hear what each party says as to their true interpretation, and what each respectively says he intended by them; he may also consider what interpretation would be put upon them by an uninterested man of ordinary understanding. He may even go further, and consider the surrounding circumstances, so far as they throw light upon either the sense of the promise, or the intention of the promiser, or the expectation of the promisee. But after all he must put upon the words his own interpretation; and from the sense which he attaches to the words he must *presume* the intention. So that the current phrase 'the intention of the parties governs the contract' is really only true to this extent; that it governs the contract, where both parties are agreed what the intention was. Where there is a dispute as to the intention, the contract, or rather the contractual liability, is governed by the intention, as it is presumed from that sense which, under all the circumstances, the judge thinks ought fairly to be attached to the promise.

623. For instance, suppose you wrote me a letter offering to buy 'my bay horse, if warranted sound, for one hundred pounds,' and that I accepted the offer; whereupon I sent the horse to you with a written warranty as a fulfilment of the bargain. If we were to dispute, whether the warranty I offered you was such a warranty as was contemplated, the court would hear what you and I had to say as to the meaning of the agreement, and our re-

spective intentions and expectations; but would in all probability decide, that the sort of warranty which I was bound to give was the usual warranty in such cases; that being the warranty which a man of ordinary sense and understanding would expect under the circumstances. And whatever sense experienced persons usually attach to the word 'warranty' when dealing in horses, the court would attach to it in this case, and decide that that was the warranty I was bound to give, whatever protest you might make that that was not what you expected to receive, or I might make that that was not what I intended to give.

624. If, indeed, after having agreed to purchase my *bay* horse, you wanted to make out that your real intention was to purchase my *brown*, the court would scarcely listen to you. Suppose, however, that I have two bay horses, and you insisted that you had bought one, whilst I insisted that you had bought the other. On the words of the promise itself it might be impossible to discover whether we really intended the same or different horses; and, if the same, which. But a very little further inquiry might possibly clear up the whole matter. It might turn out that, of my two bay horses, I had sent one to you to look at; that you had offered me seventy-five pounds for this bay horse, and that I had insisted on having one hundred: after which, your offer to purchase 'my bay horse' for one hundred pounds was delivered. Now if nothing had ever passed between us about the other horse, and your offer of a hundred pounds 'for my bay horse' followed close upon this negotiation, there would be no doubt at all that you would be considered to have bought that horse which had been sent to you for inspection. And the judge would come to this conclusion, not because he is certain that this was what I, or you, or both of us intended. If you are a person of high character for veracity, and you deny that this was your intention, the judge would hesitate long before he disbelieved you. But in this case the doubt would not

embarrass him. He concludes that no reasonable man would suppose that any other horse was referred to, and he fixes upon that horse accordingly.

625. This, I think, is the practical method which tribunals adopt for deciding, in cases of dispute, what liability has resulted from a contract. For this purpose they generally adopt certain maxims of interpretation¹, which, however, generally conclude with a protest that these maxims must always yield to the evident intention of the parties. What is here called the 'evident intention of the parties' is that presumed intention which, as I have said before, the judge takes from the interpretation, which interpretation may possibly conflict with one or another of the generally accepted maxims².

626. I shall now discuss a very peculiar rule of English law, which I shall have to examine at some length. The English law says that there is no liability upon a contract, unless the contract fulfils one of two conditions—namely, either that it is made upon a 'consideration,' or that it is contained in a deed under seal. Consideration.

627. A contract, we are told, is made upon 'consideration' when some thing is done, forborne, suffered, or undertaken, by one party at the request of another, which is made the foundation of the promise of that other. What is meant by consideration.

¹ See Chitty on Contracts, ch. i. sect. 3. par. 4, where these maxims are collected. It is common to transfer the maxims for the interpretation of wills, conveyances, and contracts from one to the other without very careful discrimination; but I doubt whether the interpretation of these three classes of documents proceeds upon precisely the same principles.

² Inasmuch as wherever the sense of the promise differs from the intention of the parties, or of one of them, there is not, strictly speaking, an agreement, it has been proposed to remodel the conception of contract, and leave out 'consensus' altogether. This would entail a stupendous modification of legal language and I do not think it would lead to any satisfactory result. Not only in contract but in the enormous number of cases in which intention or knowledge enters into the grounds of liability there is a chance that the court may go wrong in ascertaining what passed in the mind of the person concerned. But that is no ground for declining to treat the presumed intention as the real intention: as it is in fact in the vast majority of cases.

Consideration peculiar to English law.

628. This rule about consideration is not recognised by any other system of law in the modern or ancient world. It is only recognised in England and in those countries which have derived it from England. It is not recognised in Scotland. The opinions of jurists may, therefore, be fairly said to be divided as to the usefulness of the rule, and under these circumstances one may criticise the rule without being guilty of presumption.

Meaning of the rule.

629. In order to ascertain, if possible, what is the principle on which the rule proceeds, let us take a simple case which often occurs. A father says to his son that he will give him a certain sum, say £1000. If the father refuses to fulfil this promise the son cannot sue his father. If the father writes out the promise in the most formal manner and signs it, still the son cannot sue the father. If the father affixes his seal to the document then the son can sue him, if the money is not paid. Such is the law of England. Can a rational explanation be given of it?

Gratuitous promises.

630. We must be careful not to confound the rules about consideration with the rules relating to gratuitous promises. A gratuitous promise is obviously a transaction which the law will regard with some suspicion. There are the same reasons for jealousy in regard to gratuitous promises as there are for jealousy in regard to gifts. But then many of these reasons are as strong against gratuitous promises made in a deed under seal as they are against gratuitous promises made in writing without seal or by parol. Accordingly we find in English law special rules whereby the legal result of gratuitous promises in every form are regulated. But the rule as to consideration evidently proceeds upon a different principle from this, for it says nothing whatever about invalidating the legal result of gratuitous promises provided they are made in a particular form.

How applied to deeds.

631. The reason which is given by English lawyers, why the father should not be liable to be sued by the son in the two first of the above cases, and should be liable to be sued

in the last, is that the deed 'imports consideration.' This points to an attempt to make it appear that the English law in all cases consistently requires a 'consideration' in order that a promise may be sued on. Yet it is obvious that this is only a pretence. To say that a deed 'imports consideration' is only another way of saying that a promise under seal may be sued on without consideration. Moreover if it were of importance to ascertain whether the deed were gratuitous, the notion that a deed 'imports consideration' would be wholly disregarded.

632. Again, if we turn to promises not under seal we see that though a consideration is necessary, yet it is constantly insisted on that no inquiry can be made as to the adequacy of the consideration. All that is necessary is a consideration *in form*. If *A* promises *B* a thousand pounds for nothing in return the promise cannot be sued on. If he promises *B* a thousand pounds in return for a peppercorn it can be sued on. Yet both these promises are gratuitous.

Adequacy cannot be enquired into.

633. It is clear therefore that consideration has nothing whatever to do with the question whether or no the promise is gratuitous. A promise may be purely gratuitous, and yet, being based upon a merely nominal consideration, may give rise to liability.

634. What then is the real explanation of these three things: (1) that a contract under seal is enforceable without consideration; (2) that a contract not under seal is not enforceable without consideration; (3) that it is entirely indifferent whether the consideration be of any value or not?

635. The only rational and consistent explanation of these three things is that the question is really one of form. The being under seal or not is as pure a matter of form as can be. And how can it be a matter of substance to require as a consideration that which may be of absolutely no value? of course bearing in mind that these things have nothing to do with the contract being gratuitous. As a matter of form these things are both important. The form of a deed is

Suggested true meaning of the rule.

a sure indication that the parties contemplated a legal relation : the form of a bargain, or giving a quid pro quo, is not conclusive, but it is, certainly, useful as an indication that the parties contemplated a legal relation : but no one would deny that there are many cases where a legal relation is contemplated, in which, nevertheless, there is no consideration.

636. Where, therefore, the English law seems to me to have gone wrong is this: that which is a mere matter of form has been used for a wrong purpose ; that which is only one out of several possible indications has been used as if it were the sole test. Consequently the judges are every now and then thrown into the greatest difficulty ; they are either driven to results which are obviously, even to themselves, unsatisfactory, or they have to avoid these objectionable results by reasoning which would not be accepted under any other circumstances.

Promises
which a
man is
already
bound to
perform.

637. There is, for example, a class of cases not unfrequently occurring in which *A* and *B* have made mutual promises. As is usual in such cases the promise on one side is the consideration for the promise on the other, but a difficulty is raised by showing that what *B* has promised is something which he was already bound by law to do. To the argument that there is a promise by *B* in return for the promise by *A*, and that the court will not look into the adequacy of the consideration, the judges, viewing the consideration as a condition of liability, feel obliged to reply that they still cannot acknowledge a consideration which is *obviously* worthless.

638. As a specimen of this class of cases I may take the following :—*A* said to his nephew *B*, who was engaged to marry *X*, that on his marriage he would allow him £100 a year. There was no difficulty in construing this as a promise by *B* to *A* that he would marry *X* if he obtained the annuity, and by *A* to *B* that if he did so *A* would make him the allowance stated. Accordingly *B* did marry *X*, and for some time the annuity was paid. At length *A* died, and *B* called upon *A*'s executors to pay an instalment of the annuity which had fallen due in *A*'s lifetime. The executors refused

to pay, denying the liability of *A*. In the suit which followed, the decision turned upon whether there was any consideration for the promise of *A*. The mere promise of *B* to *A* that he would marry *X*, being a promise by *B* to do something to which he was already bound, was, in accordance with numerous decisions, said to be not a consideration: and the most ingenious suggestions were made to show how it might in this particular case have become so. It would have been much simpler, more in accordance with the facts, and, I venture to think, more reasonable, to hold that the case was one in which legal liability was clearly contemplated by the parties, and liability ought therefore, for that reason, to be enforced ¹.

639. Another set of cases, of which the following is an example, has been found equally embarrassing:—*B* at the request of *A* handed him over a letter, by means of which *A* gained an action in which he was then plaintiff. *A* did not promise anything to *B* at the time, but afterwards he promised to give *B* a thousand pounds for letting him have the letter ². Of course there was no ‘consideration’ for his promise, and if consideration is necessary the suit ought to have been dismissed, which it was not. And to dismiss the suit would have been so obviously unjust that very ingenious arguments have been produced in support of the decision. They are not very convincing. Surely it would be only common sense in such a case as this to hold that the parties intended to make a legally binding contract, and that they had done so.

640. It has been said in reference to cases of this kind that it is not reasonable that one man should do another a kindness

¹ The case referred to is that of *Shadwell v. Shadwell*, reported in Common Bench Reports, New Series, vol. ix. p. 159. See the observations in *Anson on Contracts*, 7th ed. p. 90; and in *Pollock on Contracts*, 5th ed. p. 177.

² The case is that of *Wilkinson v. Oliveira*, reported in *Bingham's New Cases*, vol. i. p. 490. The case seems generally to have been understood as I have stated it: and this view of it is borne out by the pleadings as stated in the report. The argument, however, and the decision do not proceed entirely upon this ground. See *Pollock on Contracts*, 5th ed. p. 169; *Anson on Contracts*, 7th ed. p. 96.

and then charge him a recompense for it. Nothing could be more unreasonable; but nothing of the sort would be done in any case where the promiser was made liable because he had of his own consent undertaken a legal liability. If the handing of the letter in the case I have referred to was a kindness, probably the promise of £1000 might have been a kindness also. But the court thought otherwise: and I think it will be generally agreed that a man ought to pay for a service performed at his request, and also that he ought to pay whatever he has himself deliberately estimated as the value of the service.

641. There are many other cases in which promises have been held to create liability, but in which it has been found very hard to discover a 'consideration':—promises, for example, by a person of full age to pay a debt contracted during infancy; promises by a bankrupt to pay debts from which he has been discharged; promises by a widow to pay debts contracted during her marriage; promises to pay debts barred by the statute of limitations. In all these cases a variety of ingenious suggestions have been made in order to make decisions square with the doctrine of consideration. A simple suggestion which explains them all is that they were all cases in which the promiser himself intended to create a legal liability¹.

Contracts
of bail-
ment.

642. Perhaps the boldest discovery of a 'consideration' is in those cases where the court has enforced a gratuitous promise to take charge of property. It is said that there is in such cases a consideration because 'the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management.' I give the words, I do not profess to understand them².

Cases in
which
there is

643. If we now turn to cases in which the liability has been denied, we shall find the reasoning on which the decisions rest

¹ See these cases collected and discussed in Anson on Contracts, 2nd ed. p. 10.

² The words are those of no less a judge than Lord Holt, and they have received repeated approbation. See Smith's Leading Cases, 7th ed. pp. 189, 205, 207.

equally unsatisfactory. Thus, suppose that *A*, as a pure matter of business, offers to sell goods to *B*, and expressly agrees to let this offer remain open till the next day at the same hour, and in the meantime not to sell the goods. It has been held that if *A* nevertheless sells the goods before the time has expired he is not liable, because there is no consideration for the promise not to sell. Every one, I think, must feel the unsatisfactory nature of this conclusion. The arrangement is perfectly unobjectionable, and in many cases a very convenient one. It might be made under seal, but a deed is an expensive and troublesome affair, quite unsuited for such a transaction as this. The parties clearly intended that the transaction should have a legal result, and it would be far more satisfactory if it were enforced.

644. A representative case of another class is the following:—*A* was guardian for a minor, who had property, but ready money was required for the management of it, and for the maintenance and education of the minor. Accordingly the guardian borrowed money on his own security. When the minor came of age she promised to repay the money, but soon afterwards she married, and then her husband, who had had the benefit of her property, promised to repay it. Upon this promise the husband was sued¹. There were similar cases in which the promise had been enforced, but these cases were overruled; and because there was no consideration for the promise it was held that no action would lie upon it. I have never been able to understand the satisfaction with which this result has been regarded. It was, no doubt, a triumph of the doctrine of consideration, but a triumph gained at the clear expense of justice. Surely it might have been better held, as in fact the previous cases had held, that an express undertaking of a liability was binding: not, however, upon the stupid ground that a moral

no con-
sideration.
Promise
to keep
offer open.

So-called
moral con-
sideration.

¹ See the case of *Eastwood v. Kenyon*, reported in Adolphus and Ellis' Reports, vol. xi. p. 446, overruling the decision of Sir James Mansfield in the case of *Lee v. Muggeridge*, in Taunton's Reports, vol. v. p. 36.

consideration supports a promise, but upon the ground that a liability was intended and ought to be enforced¹.

Account
stated.

645. A very curious result of the doctrine of consideration is the following:—Supposing that *A* and *B* having had dealings together go over the account between them, and agree to strike a balance at £500 as due to *A*: and thereupon *B* agrees to pay that sum upon request. *B* is liable to *A* if he breaks this promise. But suppose that *B* says he will pay the money that day week. *B* is not liable upon this promise because there is no consideration for it. This ridiculous result (for it is impossible to describe it as otherwise) is, I have no doubt, a logical deduction from the English rules about consideration, and I have no doubt that the exceedingly acute judges, who so laid down the law, were only actuated by the fear of letting the whole ‘fabric of consideration’ fall to the ground had they decided otherwise. Now what would have been the result if instead of inquiring whether there was a ‘consideration’ the judges had inquired whether, in accordance with Savigny’s definition, the parties contemplated a transaction which would create liability? The result would be that both promises would be considered as promises which might be sued on. And this is the only result which accords with common sense².

Release of
debt.

646. The last illustration I shall give of the unsatisfactory nature of the doctrine of ‘consideration’ is the perpetual and, apparently at this moment, unsuccessful struggle to hold persons bound by a gratuitous promise to forgive a debt. Promises of this kind should, of course, be as jealously watched as all other gratuitous promises. But this object is not effected by saying, as the English law says, that a

¹ It has been suggested that Lord Mansfield formulated the doctrine that consideration was only one of various modes by which it could be proved that the parties intended a contract (Anson on Contracts, 7th ed., p. 104). I wish I could think so, but I have never found it in any decision of that eminent judge.

² The case referred to is that of *Hopkins v. Logan*, reported in the 5th vol. of Meeson and Welsby’s Reports, p. 241.

debt, whilst it may not be simply forgiven, may be discharged by the handing over of a peppercorn¹. The true way to deal with such cases would be to accept the inevitable conclusion that the parties to such a transaction had in contemplation their legal relations; and to allow them to regulate these as they think proper, subject to any wholesome restrictions against gratuitous disposal that may be found desirable².

647. The result which I have arrived at from a perusal of the decisions of English judges upon the question of consideration is that it is impossible to apply it as a test of legal liability with consistency and with justice: that it can only properly be treated, not as a test, but as an indication: an indication, but an indication only, amongst many others, that the parties entering into a transaction had in contemplation their legal relations to each other³. Conclusion.

648. The question, whether or no, notwithstanding the intention of the parties, the breach of a gratuitous promise should create any liability is, as I have said, a totally distinct one: and it is obvious that in order to deal satisfactorily with this question the notion that the adequacy of the consideration is not to be inquired into must be entirely discarded. It would be absurd when you are considering the validity of Gratuitous promises.

¹ See Smith's Leading Cases, vol. i. p. 341, and Pollock on Contracts, 3rd ed. p. 197. The absurdity is here admitted.

² One of the strange anomalies in English law which appears to be connected with the doctrine that a contract cannot be enforced without consideration is this: that if I give a direction, whether by deed or not, that property of which I have a right to dispose shall be handed on to a person whom I wish to benefit, that will be valid without any consideration; but if I attempt to give a security upon the same property, even by deed, and where there is no doubt whatever as to the animus donandi, that will not be valid without consideration. This certainly looks very like a 'frivolous technicality.' See Law Quarterly Review, vol. vii. p. 103.

³ It will probably be long before the doctrine propounded in the text will be accepted by English lawyers. I am, however, glad to see that a recent learned writer agrees with me that the true function of consideration is 'evidence that a promise was intended to be binding.' Anson on Contracts, 7th ed. p. 104. This, to my mind, leads strongly to the conclusion that other indications of intention should not be shut out.

gifts to look upon a promise of £1000 in return for a pepper-corn otherwise than as a gift of £1000; or to look upon the acceptance from a solvent man of £40 in lieu of £100 otherwise than as a gift of £60; or at the payment of 20s. for a quarter of wheat worth only 40s. otherwise than as a gift of 160s. But by the generality of the rule forbidding judges to look into the adequacy of consideration, and by the notion that a deed 'imports' consideration, the English law has obscured and confused the subject of gifts. In almost all systems, in the Roman law¹, in the Preussisches Land-Recht², in the French Code Civil³, in the Italian Civil Code⁴, even in the Mahommedan law⁵ we find the subject treated fully, and for the most part satisfactorily. Gifts actually made are under certain circumstances revocable or void: gifts not yet made can under certain restrictions be enforced. The English law, where it has dealt with gifts apart from the question of consideration, has mixed them up with the question of fraud. Thus if a husband being insolvent gives his money to his wife instead of to his creditors, this is obviously a transaction which ought to be set aside: and it may be a fraud; it would be so, if there were a secret understanding between the husband and wife that the money should still belong to the husband. But it ought to be set aside even although there was a real transfer and no fraud. An insolvent ought not to be allowed to make either real gifts or pretended ones: and nothing is gained by 'presuming' fraud.

Void and
voidable
contracts.

649. I have already made some observations upon the terms 'void' and 'voidable' as applied to legal transactions, and the care that is necessary in distinguishing the various modifications of the result of a transaction which are described by these terms⁶. This care is especially required in the case of contracts.

¹ See Sohm's Institutes of Roman Law (Ledlie's Translation), p. 138.

² Preuss. L. R. Part i. Tit. xi. §§ 1037-1077.

³ Co. Civ. Art. 893 sqq.

⁴ Codice Civile, Art. 1050 seqq.

⁵ Perron, Précis de Jurisprudence Musulmane, vol. v. pp. 64 sqq.

⁶ See *supra*, sect. 274.

650. The principal circumstances which modify the result of a contract are defects of form, absence of consideration, illegality, infancy, mistake, fraud, misrepresentation, duress, and undue influence.

651. There has been a long pending discussion, not yet closed, as to whether contracts defective in form are to be considered as void. The discussion has, I think, been complicated by its not being clearly agreed in what sense the word 'void' is to be used. Many persons who deny that contracts defective in form are void, apparently only mean to say, that they are not entirely devoid of legal result. Other persons seem to mean when they assert that they are void that they do not produce the legal result contemplated. Of course, it is possible that the same contract should be void in the last of these two senses and not so in the first. In fact I have little doubt that every contract defective in point of form is void in the last of these two senses; whereas a contract hardly ever is so in the first.

652. There is another meaning in which the word 'void' is sometimes used as applied to contracts. It is sometimes said that a contract is void, even when as between the parties themselves an action can be brought upon it, if third persons cannot acquire rights under it. This is a peculiar condition of things which sometimes occurs, but I do not see why under such circumstances the contract should be called void.

653. What I have said as to the uncertainty of the meaning of the term 'void' as applied to contracts defective in form is well illustrated by certain discussions which have arisen upon the Statute of Frauds. In consequence of a slight difference between the language of sect. 4 and that of sect. 17 it has been said that contracts under sect. 4 are not made void for a defect in form, whereas the very same defect makes void contracts under sect. 17.

654. But is there any sense in which a contract could be called 'void' under sect. 17 for a defect of form and not under

Defects of form.

Non-compliance with Statute of Frauds.

sect. 4? I know of none. In the sense that the transaction does not produce the liability which the parties contemplated the contract is void under both sections. In the sense of producing no legal result whatever, the contract is not void either under sect. 17 or under sect. 4. Thus, suppose *A* verbally offers to sell *B* a horse for £50, and *B* verbally accepts the offer. This is a case which falls within sect. 17, and the contract not being in writing does not render *A* liable to be sued by *B* if he refuses to deliver the horse. It is, therefore, undoubtedly void in the sense that it does not produce the liability contemplated. But suppose that *A* afterwards writes to *B* and says, 'the horse you bought of me is waiting in the stable for you to take him away.' This does not make a new contract, but the contract originally made immediately becomes one upon which *A* may be sued. The contract, therefore, was clearly not void in the sense that it has produced no legal result whatever.

655. Now take a case under sect. 4. *A* promises *B* by word of mouth to pay the debt of *C*. It is said that this is not void; that it is a contract, although it is not clothed in the necessary form. It may be so. That depends upon how you define a contract. But it certainly does not produce the result which the parties contemplated, namely, that the promise should be enforceable against the promiser.

656. I do not say that the legal results of a defect of form under the two sections are the same. As to that I say nothing. The decision in the well-known case of '*Leroux v. Brown*¹,' that a verbal contract made in France may be sued on if it falls within sect. 4 and not if it falls within sect. 17, may or may not be correct; but in either case the observations which I have just made will hold good.

657. Absence of consideration renders a contract void in the sense that it prevents the agreement from producing the liability contemplated both as between the promiser and promisee, and as between the promiser and any other persons.

658. Illegality also renders a contract void in this sense,

¹ Reported in Common Bench Reports, vol. xii. p. 801.

and, as far as possible, courts of law deprive an illegal contract of all legal results whatsoever.

659. It is frequently said that a person who is not a party Transfer of contractual liability. to the agreement which is the basis of the contract cannot incur any liability under the contract; and that likewise a person who is not a party to the agreement cannot enforce any liability under it. Of course no one who is not a party to an agreement can incur any liability, or acquire any right to enforce a liability, by reason of his consent to that agreement. If any liability is imposed upon him it must be, not because of his consent to that agreement, but for some other reason.

660. But a promise by *A* to *B* is very often enforceable by *B* against *C*, and a promise made by *D* to *E* is very often enforceable against *D* by *F*. And if this is what is meant by 'liability under the contract,' the rule as above laid down is subject to so many exceptions, that I hardly think it ought to appear as a rule at all. There are multitudes of cases in which the heir, executor, administrator, or assignee of the party to a contract may incur liability, or acquire a right to enforce liability, under a contract to which he was no party.

661. Much, no doubt, will depend upon what appears to have been the intention of the parties. If the intention was that the liability should exist only as between the two original parties to the contract it will not be extended.

662. It used to be said in somewhat barbarous language that contracts are choses in action, and that choses in action are not assignable at common law, but that they are assignable in equity. Now that all courts administer equity I think that this language might be well dropped; and that the rule should be stated generally that the right and obligation under a contract are both assignable, unless it appears that the parties to the contract intended otherwise. This will sometimes appear by the words used and sometimes by the nature of the transaction. A promise, for example, to

perform personal services is one in which the liability cannot be transferred.

Offer and
accept-
ance.

663. It has also been frequently said that to create liability under a contract there must be an offer by one of the parties and an acceptance by the other. This I think is true. At the same time liability may be created by an offer and something which ensues upon it which is not an acceptance.

Reward
for finding
lost pro-
perty.

Thus, if *A* offers a reward for the recovery of lost property, and *B* who has never heard of the offer restores the property, he may sue *A* on the promise. I think, however, that though *B* sues on the promise there is no real contract, but only what may be called quasi-contract. The reason for calling it a quasi-contract is that *A* and *B* are as nearly as possible in the same position as if they had made a contract.

663 a. Of course if *B* having heard of the offer accepts it, even though that acceptance be not at once communicated to *A*, if it is communicated before the offer is revoked, there is a complete offer and acceptance: the case would be more difficult if the offer had been revoked before it was accepted, and the revocation had not been communicated to *B*, but I apprehend that the true principle is that an uncommunicated revocation is no revocation at all¹.

Undis-
closed
principal.

664. There is another case in which liability exists which is certainly very like contractual liability, but in which there is no offer and acceptance. *A* says to *B*, 'I contract with you.' In truth *A* is making the contract on behalf of *C*. There is a liability of *A* to *C*, and of *C* to *A*; a liability which is generally called liability *ex contractu*. But nothing whatever has passed between *A* and *C*. Not only (to use the expression of Lord Cairns), the mind of *A* never rested on *C*, but it rested on another person².

Liability
is a thing
and object
of owner-
ship.

665. The liability of the promiser to fulfil his promise is a thing; and from its being capable of being bought and sold, assigned and transferred like other things, and also from its

¹ See *supra*, sect. 644 note.

² See § 746.

having a money value, it is looked upon as the object of ownership.

666. The view of liability that it is a thing which is the object of ownership, that it is in fact property, leads naturally to the conclusion that, like other property, it is protected by the law which prohibits certain acts being done which would damage it. This, I take it, is the true explanation of the case of *Lumley versus Gye*¹, in which the defendant was held liable for having, with the intention to cause damage to the plaintiff, induced a person who had made a promise to the plaintiff not to fulfil it. This was an injury to the plaintiff's property².

¹ Reported in Ellis and Blackburn's Reports, vol. ii. p. 216.

² It is because the liability or obligation is the object of ownership that contract is said to create a right in rem as well as a right in personam. See Anson on Contracts, 7th ed. p. 227.

CHAPTER XVI.

LIABILITY FOR TORT.

667. IN the same way as the examination of liability *ex contractu* involves an analysis of contract, so the examination of liability *ex delicto* involves an analysis of delict or tort. I am therefore brought face to face with that most difficult of all questions—What is a tort?

Tort and
delict.

668. It is not necessary that tort and delict should be exactly equivalent expressions, but I think that they are understood to be so. Liability for a tort is, I think, considered to be equivalent to liability *ex delicto*, but the word ‘tort’ is more in common use with us than the word ‘delict.’

French
definition
of delict.

669. On the continent the word ‘tort’ is not used, but there is in the French Civil Code a chapter headed ‘Delicts,’ which would lead us to suppose that we should find delicts there fully defined. All, however, that I am able to infer from what is there said is that a delict is an act of one man which causes damage to another, provided that the act be done intentionally, negligently, or imprudently. That some acts so done give rise to liability is, no doubt, true, but one at least of the principal terms used in this description is, as I shall show presently, exceedingly vague, and it is certain that many acts which this description would cover are not delicts; nay more, that many acts so done do not give rise to any liability at all¹.

¹ The clauses are as follows, Art. 1382:—‘*Tout fait quelconque de l’homme, qui cause à autrui un dommage, oblige celui par la faute duquel*

670. English lawyers have not yet made any attempt to define torts¹, and I therefore proceed to examine the phrases in common use among lawyers when they wish to give their reasons why liability *ex delicto* exists in some cases and not in others; and also the various terms by which they describe events which give rise to this liability, and by which they distinguish events which do not give rise to it.

671. We generally find that those acts which are called torts when considered with reference to the obligation which results from them are, when considered with reference to the nature of the act itself, called injuries; and a good deal is made of this word 'injury,' as if it, in itself, told us a good deal about the matter. We are told over and over again, that in order that a man should be liable for any damage, on the ground that it is a tort, there must be injury. But what is injury? All we know of it is that it is the infringement of a right. I believe also that injury is here used in the special sense of an infringement of one or other of those rights which relate to property, or personal security, or reputation. But what are those rights? I have never yet found them described. If we knew them, then we should also know the duties and obligations to which they correspond, and our difficulty would be solved.

672. When something more definite than this is attempted, we generally find that the act or omission, which

Qualifying
adverbs.

il est arrivé à le réparer.' Art. 1383, 'Chacun est responsable du dommage qu'il a causé, non seulement par son fait, mais encore par sa négligence, ou par son imprudence.' See Pothier, *Introduction Générale aux Coutumes*, sect. 116; *Traité des Obligations*, sect. 116; and *Les Codes Annotés de Sirey*, par R. Gilbert, Paris, 1859.

¹ See however the recent discussions in Pollock on Torts, and Bigelow on Torts. I scarcely think the difficulty of arriving at a definition has been surmounted, but the labours of these two learned authors have contributed largely to a clearer understanding of tort. Sir Frederick Pollock, in his draft of a Civil Wrongs Bill for India, lays it down that 'every one commits a wrong who harms another by an act intended to cause harm.' But surely the law knows no such broad general principle. Evil-disposed persons can commit any amount of mischief with the most malicious intentions without any risk of coming within the reach of the law.

is said to be an injury, is qualified by some adverb which is apparently intended to indicate that which constitutes the required test of liability. Amongst such adverbs I find the following—fraudulently, dishonestly, maliciously (*avec préméditation, avec de guet-à-pens*), knowingly, intentionally, wantonly, malignantly, rashly, negligently, wilfully, wickedly, imprudently, and clumsily (*par maladresse*). So also I find used such adverbs as forcibly, with a strong hand, violently (*avec violence et voies de fait*), riotously, tumultuously, or in large numbers (*par attroupement*). Again, for the same purpose I find such expressions made use of as wrongfully, feloniously, unlawfully, illegally, injuriously, and unjustly¹.

673. I have purposely selected these adverbs, as well from the descriptions of those acts which are called crimes, as from the descriptions of the similar acts which are called delicts or torts, without any attempt at discrimination. For criminal liability and civil liability do not radically differ. Criminal liability generally comprehends civil liability also, combined with some additional element which, for our present purpose, is not of importance.

What
these
adverbs
express.

674. Considering these adverbs, it appears to me that they may be divided into three classes, which are indicated by the order in which I have enumerated them : as follows—

First, those which are, apparently, intended to express the condition of mind of the person who does the act.

Secondly, those which are, apparently, not intended to characterise the act simply as the occasion of liability, but which are intended to express what is commonly called an aggravation—that is to say, to mark the act as giving rise to a special secondary or sanctioning obligation of a serious kind.

¹ Many of these adverbs also make their appearance in Codes, and other legislative productions, but I think they mostly originated with judges. At any rate I have been desirous to gather together every mark of liability that can claim authority, from whatever source it may proceed.

Thirdly, those which are, apparently, intended to express something, but really express nothing at all; being only so many different names for the very thing the nature of which we are trying to discover.

675. The terms of the second class can be of no assistance to us here. We are considering not the nature of the consequences to which a party is liable, but whether he is liable at all. The adverbs of the first class, therefore, are those from which we have to derive our conception of liability. Most of the terms of the first class refer to the condition of mind of the person sought to be made liable at the point of time when his conduct is considered; and two of them—‘knowingly’ and ‘intentionally’—only describe that condition. The rest, or most of the rest, combine with this purely mental element an element of another kind: they more or less imply that the state of mind under consideration is, when tried by some standard which the person using the expression has in view, not what it ought to be. What this standard is, it is not easy to discover, but it is something in the nature of a moral standard.

676. In a former chapter¹ I analysed, as well as I was able, the mental attitude of the doer of an act, and the relation of that attitude to the result. As I there showed, a man may advert to the consequences of his acts, or he may not advert to them. If he adverts to them, he may desire them or may not desire them to happen; if he does not desire them to happen he may still expect them: or still advert to them he may neither desire them nor expect them.

677. These several states of mind are expressed by the terms—intention, knowledge, advertence, and inadvertence.

678. Intention, knowledge, advertence, and inadvertence, do not always give rise to liability, even if they accompany an act which causes damage. If I do an act with the desire to harm another, I shall only be liable if the law forbids that act. So if I do an act which I know to be likely to

¹ Chap VI.

injure another. And, if I advert to the consequences of my act without desiring or expecting them, or if I do not advert to the consequences of my act, I shall only be liable if the occasion be one upon which the law requires from me a certain degree of circumspection, which I have failed to exercise. In the case of advertence this culpable want of circumspection is called rashness; in the case of inadvertence it is called heedlessness¹.

Negligence.

679. Bearing this in mind let us revert to the first class of adverbs above enumerated. Of all these, the adverb in most common use is 'negligently.' Books have been written upon negligence, and hundreds of reported cases are wholly taken up with the discussion of it. It is, therefore, of the last importance thoroughly to examine it.

How opposed to intention.

680². When negligence expresses a state of the mind (for, as I shall show hereafter, it does not always express a state of the mind at all), it is opposed to intention; and it expresses without distinction either of the two conditions of mind which I have called rashness and heedlessness; but more generally the latter. It is also used with reference to the not doing as well as the doing of an act. Thus it is said that death, ensuing in consequence of the malicious omission of a duty, will be murder, but that death, ensuing in consequence of the omission of a duty which arose from negligence, will be only manslaughter³. By malicious⁴ omission of a duty I understand to be here meant, that we omit to do an act which we are commanded to do, that we advert to the consequences of the omission, and that we expect these consequences to ensue, though not necessarily desiring those consequences, either as an end, or as

¹ Supra, sects. 226, 228.

² Austin, Lect. xx. p. 444 (3rd ed.). See also supra, Chap. VI.

³ The distinction between murder and manslaughter is thus drawn in the case of the Queen against Hughes, by Lord Campbell delivering the considered judgment of five judges. See Dearsley and Bell's Crown Cases, p. 249.

⁴ See infra, sect. 686.

means to an end. By negligent omission of a duty I understand to be here meant, that we omit to do an act which we are commanded to do, either without adverting to the consequences when we ought to have adverted to them—that is, heedlessly—or, adverting to them, but expecting on insufficient grounds—that is, rashly—that they will not ensue. So again we find it said in discussions about negligence, that negligence alone is not a sufficient cause of action without a breach of duty¹, which I understand to mean that when consequences which we did not intend or know to be likely ensue upon an act or omission, then we are liable if we were heedless in disregarding those consequences, or rash in the expectation that they would not ensue. Negligence therefore, so far, seems to be only a general expression for rashness and heedlessness.

681. But in the latest and most authoritative expositions of the term negligence, we find quite a different meaning attached to the term. Negligence is declared to describe, not the state of mind of the party who does or does not do the act; not the absence from his mind of certain ideas which might have led him into a different course of action or inaction, which state of mind he might have avoided, and which ideas he might have recalled by a proper use of his faculties—not in short that which I understand by the word heedlessness; not, again, the hasty and ill-grounded expectation that results will not follow, which I understand to be expressed by rashness; but the absence of diligence, and even of skill; and moreover, not the absence of that

Later ex-
position-
of its
meaning.

¹ This is the language of Sir William Erle delivering the judgment of seven judges in the case of Dutton against Powles; see Law Journal Reports, vol. xxxi. Queen's Bench, p. 191. Compare the observations of Sirey on the Code Civil: 'Dans l'application de l'article 1382 et pour savoir quand il y a *faute*, il faut se souvenir que la loi entend par là l'action de faire une chose qu'on n'avait pas le droit de faire.' It is curious to observe how regularly lawyers in every country, when pushed upon any of these terms, fall back upon the barren generality, that they express what the law forbids; *quod non jure factum*. (See Digest, Book ix. tit. 2. sect. 5. par. 1.)

diligence, or skill, which the party under the circumstances was able to exercise, but of that diligence, or skill, which under the circumstances the law requires. So that whatever be the exact nature of the qualities to which we ascribe these names, the conduct of the person is not at all what is considered, but whether he has fulfilled a special obligation which he has incurred. Thus it is said that the 'action for negligence proceeds upon the idea of an obligation towards the plaintiff to use care, and a breach of that obligation to the plaintiff's injury¹.' And more explicitly still, 'a person who undertakes to do some work for reward to an article, must exercise the care of a skilled workman; and'—not his inadvertence, or even his neglect to use such skill as he possesses, but—'the absence of *such* care is negligence.'

Modern
interpretations
of the term
negli-
gence.

682. It is obvious in these cases, particularly the last, which is the language of a judge celebrated for the acuteness and accuracy of his legal perceptions, that the term 'negligence' is used to express something wholly independent of the conduct of the person whose act or omission is under consideration. The workman's negligence consists, not in heedlessness of the act he is doing or omitting, or of its consequences; not in his omitting to use all the care of which he is capable; but in his omitting to use the care which a skilled workman would use, whether he is himself capable of it or not. It is simply the omission to perform a positive duty, and in this particular case a positive duty which arises upon a contract. As the phrase is, the workman, when he undertakes the work,

¹ This is the language of Lord Penzance in his considered judgment delivered in the case of *Swan against The North British Australasian Company*; see *Law Journal Reports*, New Series, vol. xxxi. Exchequer, p. 437. The next quotation is from the judgment of Mr. Justice Willes, in the case of *Grill against The General Iron Screw Colliery Company*; see *Law Reports*, Common Pleas, vol. i. p. 612. Of course with a shifting term like 'negligence' it would be possible to find it used in a variety of shades of meaning, but I have confined myself to the passages most frequently quoted in the current treatises, as containing the accepted definitions of negligence.

spondet peritiam artis ; he promises to use the ordinary skill of his craft.

683. The latter use of the term 'negligence' is perfectly in accordance with ordinary language. We constantly speak of a person who breaks a positive duty as neglecting that duty, intending thereby only to express that he has not performed the act which he was bound to perform, without any regard to the state of mind which accompanied the non-performance. And as a question of terms it is only necessary to be careful to avoid sliding, without perceiving it, from this meaning of the word 'negligence' into that other meaning of it, where it expresses rashness or heedlessness ; as so easily happens when a word has several meanings not wholly disconnected.

684. But then we must consider what is the result of these definitions of negligence. What does it tell us, to say that a man is liable for negligence, in either of these senses of the word negligence ? As it appears to me, for our present purpose, just nothing at all. There may exist a standard in the breasts of our judges or jurors by which they can measure whether a man has been rash or heedless ; by which they can ascertain whether he has exercised reasonable care, or the care of a skilled workman ; but when does the law require us to reach this standard and when not ? It is this duty which requires definition. To say that a man is liable for negligence, and to define negligence as the omission to do that which the law requires, only brings us back by a very circuitous route to that which we have above said ought to be the first step in the inquiry—namely, what is the duty which the law imposes upon us ?

685. Now, as I have already pointed out, in a very large class of cases the discussion of liability turns exclusively upon the question, whether or no there has been negligence. If then it is true that the word 'negligence' in these discussions means no more than the authorities to which I have referred represent it to mean, then it is obvious that this dis-

Negli-
gence in
the later
sense of
no use
in ascer-
taining
liability.

cussion simply revolves in a circle. What is a tort? The breach of a duty. What constitutes such a breach? Negligence. What is negligence? The breach of a duty. In this way we shall never arrive at a result¹.

Malice.

686. Malice is a term which seems to be rather going out of use, though it was at one time very frequently used to express something from which liability might be inferred. It points directly to the state of mind of the person, and probably it originally expressed pretty nearly the same thing as malevolence, that is, the motive (in the estimation of the speaker a bad one) which induces a party to act or abstain from acting. It has been thence transferred to intention, and in the best known definitions² of malice it is scarcely distinguishable from intention; but it is applied, not only to cases where the consequences of an act are desired as an end, but where they are desired as means, and even to cases where they are merely adverted to and expected, without being desired at all. When used in this extended sense, the badness of the motive which prompts the act is altogether lost sight of, for it is obvious that a man may even desire to kill, as an end, or as means to an end, or he may do an act which he knows to be likely to cause death, without desiring to kill, from motives which are altogether good, and yet be guilty of a crime. Cases of patriotism, of excess in the use of the right of self-defence, or in the exercise of power by constables and

¹ In the recent case of *Heaven against Pender*, Law Reports, Queen's Bench, vol. xi. p. 509, an attempt has been made by Lord Esher to construct a proposition which would cover a large class of cases. It is said that, whenever a person is in such a position with regard to another, that by the exercise of ordinary sense he would recognise that if he did not use ordinary care and skill he would cause danger to the property or person of the other, he is bound to use ordinary care and skill to avoid such danger. The attempt is not without merit, but the proposition is too wide. See a case of *Ponting v. Noakes*, Law Reports, Queen's Bench, '94, p. 281.

² See Russell on Crimes, by Greaves, 4th ed., vol. i. p. 688 note. The definition of a malicious act there given is 'a wrongful act done intentionally without just or lawful excuse.'

other persons similarly situated, afford very frequent examples of this kind.

687. The difficulty of obtaining a clear idea of what is ^{Malice in law.} meant by the term 'malice' is also greatly increased by the use of the phrase 'malice in law.' If, for instance, I erroneously suspect you to be a thief, and I communicate my suspicions to another, not in any way intending to injure you, or thinking it likely that I shall injure you, but because I, erroneously, think it my duty to do so, there can, of course, be no malice in any reasonable sense of the word. And this is admitted in such cases by saying there is no 'malice in fact.' Nevertheless lawyers persist in such cases in saying that there is 'malice in law.' Obviously the state of the law which they approve, and which they wish to apply, is that I should be liable for the publication of statements injurious to the character of another, and that this obligation should be in no way dependent on my belief as to the truth of my statements, or on my desire or expectation that you may be injured by them. Nevertheless, the forms of procedure still assume the contrary; you are bound to state that I acted maliciously; and after it has been most carefully inquired into and ascertained that there was no malice in the matter, the judges still hold me liable by telling me that there was 'malice in law.' What, of course, this really means is, that there are circumstances under which I am liable for false statements affecting your character independently of malice; but it would be far better, and save endless confusion, if, instead of seeking to do this by interposing the phantom called 'malice in law,' we said plainly that no malice was necessary. To arrive at our point by this circuitous route is just as if the court, desiring to relieve a debtor from the obligation to pay a debt, were to tell him that he would be considered as having paid it if he sent his creditor a cheque drawn in full form upon his bankers for no pounds, no shillings, and no pence.

688. We meet with many other similar cases; thus we ^{Other similar cases.} have legal or constructive fraud as distinguished from actual

Origin of
these
terms.

fraud—a most embarrassing term; notice in law, or constructive notice, as distinguished from actual notice. Any one acquainted with the history of English law knows exactly how this has occurred. To have said that malice, or fraud, or notice, were not necessary, in cases where they had been generally thought necessary, would have been too much like an avowed innovation. For though it is, as I have shown above, a duty imposed upon English judges, within certain limits, to make new laws, it is against the tradition of their office ever to avow it. By saying, therefore, that there is malice in law, or fraud in law, they pretend that there is malice, or fraud, or whatever else they think unnecessary, when there is really none at all.

Dis-
honesty.

689. Dishonesty is a word a good deal used in some modern legislation. As far as I am able to discover, it signifies the state of mind in which a man adverts to the fact that he is committing a breach of the law and expects to gain something by it: acting, as the Roman lawyers said, *lucri causâ*¹.

Wanton-
ness.

690. Wantonness is used, as far as I can gather, to express those cases in which consequences are desired as an end, but the motive to the act is not one of the ordinary passions of revenge, or lust, or avarice, or the like; but rather (as the phrase is) the love of mischief for mischief's sake. Its use, as an expression which characterises liability, has no doubt arisen from the confusion between motives and intention, which we have already noticed in the case of malice.

Fraud.

691. Fraud, though it is a term frequently used in such a way as to suggest that it is a test of liability, has not, as far as I am aware, been authoritatively defined. Bentham²,

¹ The definition of dishonesty in the Indian Penal Code is as follows, Sect. 24:—'Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing dishonestly.' Sect. 23, 'Wrongful gain is gain by unlawful means of property to which the person gaining is not legally entitled.' Sect. 24, 'Wrongful loss is the loss by unlawful means of property to which the person losing it is legally entitled.' I think it was an error to extend the definition of dishonesty so as to make it include the intentional causing of wrongful loss.

² See Bowring's edition of Collected Works, vol. vi. p. 292 n.

however, who generally took very considerable pains to ascertain the precise meaning of terms, thinks that it embraces the idea of falsehood or mendacity. And I understand falsehood to be the moral characteristic which, after much debate, has been decided to be necessary in order to constitute liability for fraud. Nevertheless, say the books, to constitute fraud it is not necessary to show that the parties making the assertion knew it to be untrue; it is enough that the person making it did not believe it to be true¹. It is difficult to understand a distinction founded on the difference between knowledge and belief. One can easily understand a rash assertion, assumed to be true on insufficient grounds, or a heedless assertion, made without considering at all whether it is true or not; and there are not wanting indications that want of care in making assertions may, under some circumstances, render a man liable. But such statements could hardly be called false or mendacious. Moreover the distinction which philosophers draw between *believing* and *knowing* is very subtle, and by no means universally recognised. Sir William Hamilton has said that knowledge is a certainty founded upon intuition, belief is a certainty founded upon feeling; but James Mill applies the term belief to every species of conviction².

692. What I think was intended is this:—When a man makes a direct assertion, he very often impliedly also asserts that he has, to the best of his ability, exercised his judgment, and believes the assertion to be true. Thus, if I say ‘Mr. *A* has a good constitution,’ there is here a direct statement of fact concerning *A*’s health, and also, in many cases, as for

¹ This is not the exact language of Lord Wensleydale, who was the author of this distinction; but the distinction is (as I understand it) made to turn, both in the original and in the quotations of it, upon the difference between knowledge and belief. See the judgment of Lord Wensleydale in the case of Taylor against Ashton, in Meeson and Welsby’s Reports, vol. xi. p. 415; Smith’s Leading Cases, sixth ed., vol. ii. p. 94; Addison on Torts, third ed. p. 828.

² See James Mill’s Analysis of the Human Mind, ed. 1869, p. 343, note by J. S. Mill; and An Examination of Sir William Hamilton’s Philosophy, by J. S. Mill, chap. v.

instance if the question were put to me by an office about to insure *A*'s life, an implied statement, that I have exercised my judgment in the matter, and have come to that conclusion. This implied statement will be mendacious, (1) if I have not given the matter any consideration at all; (2) if I have considered it and not come to any conclusion; or (3) if I have considered it, and not come to that conclusion which my statement involves.

693. Whilst discussing the various terms which have been used to express liability, I will advert to two phrases in common use, which are sometimes placed in apparent opposition to the terms which we have been considering. These two phrases express not quite the same thing, but things nearly similar. Thus it is said of certain acts that the question of liability is not one of negligence, but that a man does them *at his peril*; so also it is said in certain cases that he is liable, not for fraud, but because there is a *warranty*. What I take to be aimed at in the first of these two phrases is, that there is some act which the law does not forbid, some act from which there is no primary duty or obligation to abstain, but for which, if a man does it and harm ensues, he will be liable to make compensation. For instance, a man is said to accumulate water in a reservoir on his land at his peril; which apparently means that it is not unlawful for the landowner to accumulate water in the reservoir, but if the reservoir bursts and the water floods his neighbour's land, he must make him compensation¹. I have some doubt whether this is the true view of the law; and whether a man is not generally prohibited from doing that which is in fact dangerous; though of course it is very often impossible to discover the danger till after the event has happened. But, even if he is not, it would only come to this—that as regards certain acts the primary duty or obligation is not to abstain from them,

Doing a
thing at
peril.

¹ See the case of *Rylands against Fletcher*, Law Reports, House of Lords, vol. iii. p. 330; and that of *Nichols against Marsland*, Law Rep., Exch. Div., vol. ii. p. 4.

but only to compensate persons who are damaged by them. It is in this view that the duty or obligation in the case above put has been often compared to that which is expressly undertaken by an insurer.

694. A warranty, properly speaking, is in form an under-Warranty. taking that certain events will happen, or will not happen; have happened, or have not happened; but it is in reality a promise to make compensation for the loss occasioned by their happening or not happening. Such a warranty is a contract; the obligation is one which arises on the agreement of the parties; and such contracts are very often entered into as ancillary, or supplemental to contracts of sale, or other similar transactions. But the word 'warranty' is not confined exclusively to transactions which are properly called contracts. Whenever it is incumbent upon a person, from any reason whatever, to take upon himself the consequences, should a statement which he makes not be true, he is said to warrant the truth of the statement; whether this duty or obligation be imposed by contract between the parties, or in any other manner. And when it is said that a party is liable for a breach of warranty, as distinguished from saying that he is liable for a fraudulent representation, I understand it to be affirmed that there is some primary obligation upon him, not only to state nothing except that which he believes to be true, but also to take the consequences of stating anything which in fact is not true.

695. Hitherto we have not got very far. We have got some idea of the meaning of some of the terms used, but we have failed to get any very distinct meaning for others, and we have got no mark or quality by which liability *ex delicto* can be known, or distinguished.

696. Now let us look at the acts themselves which are called torts, and let us see whether in that way it is possible to discover any such mark or quality.

Qualities
of acts
designated
torts.

697. There are certain duties corresponding to rights in rem Trespass.

which we call rights of ownership. Some of these rights have been enumerated and described. Every violation of a right of ownership which causes damage gives rise to a liability to make compensation to the owner for the damage done, and is a tort.

698. There are certain other duties corresponding to rights of rights of personal security. in rem which we call rights of personal security. Some of these rights have been enumerated and described. Every violation of a right of personal security which causes damage gives rise to a liability to make compensation for the damage done, and is a tort.

699. In the case of statements which damage a man's reputation it is difficult to say whether there is a duty to abstain from making them, corresponding to a right that they should not be made, or only a duty to make compensation for damage caused by them corresponding to a right to demand such compensation. It would seem, however, that there is, at any rate, a general duty to abstain from making defamatory statements otherwise than by words spoken, and that the plea which is allowed that the statement was true and that it was for the public good that the statement should be made is matter of special justification only. A man who makes a defamatory statement otherwise than by words spoken is liable to a criminal prosecution, and he must prove his justification. Some of the language we find in the books seems also to assume that there is a duty to abstain from making any defamatory statements whatsoever, and that doing so is *primâ facie* a wrong which can only be justified under special circumstances. Yet it would be difficult to assert that such a duty exists. Upon the whole the practice of the civil courts seems to me to support the view that there is no such duty as regards verbal statements. It is true that the plaintiff can put the defendant on his defence in many cases by simply showing that the unwritten defamatory statement has been made. But this is because the plaintiff having done this can then claim the benefit of three presumptions of fact, (1) that the charge made against him is false, (2) that it is

malicious, (3) that it has caused him damage. It seems clear that if any one of these three presumptions is excluded, and there is no evidence to supply its place, the plaintiff will fail, because his case is not made out. As regards the damage, it may be only a rule of practice that actions will not be entertained where no loss has been incurred. But the requirement of malice and falsity cannot be explained in this way¹.

700. Any defamatory statement which was false and malicious, and caused damage, would be called a tort.

701. There is in law no general duty to speak the truth. ^{Mendacity.} That is to say, simply telling a lie is not the violation of any legal duty. Mendacity stands on the same level as ingratitude, or cowardice. It brings down punishment on the offender, but not of the legal sort. Nor is there any general duty to make compensation for damage caused by telling a lie. Therefore, if a man were to tell a lie and thereby damage another, he would not by this alone incur any liability. But there is a duty to speak the truth on particular occasions and under particular circumstances; or, at any rate, there are occasions and circumstances when a man is liable to make compensation for any damage that may be caused by telling a lie. For example, a man will be liable to make compensation if he tells a lie to a person with whom he is transacting business, and

¹ See Odgers on Libel and Slander, p. 17, referring to Townshend on Slander and Libel, chap. iv. sect. 57; also pp. 169, 264. It seems clear that in an action of contract, if a breach of contract is proved and no damage, the plaintiff is entitled to a verdict. In an action of trespass to land, if the trespass is proved and no damage, the plaintiff is entitled to a verdict, if the title is also in question. But in an action for defamation, even if the words are spoken falsely and maliciously, yet the plaintiff will not get a verdict if there be no damage. And it is this peculiarity which I understand to be referred to by those writers who maintain that in the action of defamation damage is the gist of the action. The expression 'gist of the action' is rather vague. It is certainly not true to say that, because the Courts require both *damnum et injuria*, therefore without *damnum* there is no breach of duty. A trespass without damage is certainly a breach of duty. On the other hand, it may be true that the Courts in declaring that an action for breach of contract is maintainable without damage, and that an action for defamation is not so maintainable, are acting inconsistently.

that person, acting upon the statement believing it to be true, is damaged thereby. So he will be liable to make compensation if he tells a lie to a person intending that person to act upon it, and that person does act upon it believing it to be true, and incurs loss thereby. To cause damage by telling a lie under these circumstances is called a tort.

Misrepresentation.

702. Whether or no there is in any case, apart from contract, a liability to make compensation for harm caused by misrepresentations which are false in fact but not mendacious, is a matter upon which lawyers have differed. It is, however, now settled that in English law there is no such liability¹. If there were such a liability the misrepresentation would be called a tort.

703. There are some uses which a man is forbidden to make of his property, because they cause damage to his neighbour. Such a use of a man's property is called a nuisance. What uses of property are and what are not nuisances is not at all clearly stated. Whatever is a nuisance is also a tort.

Sic utere tuo.

704. There are some cases in which it is said that though a man by making use of his property in a particular way commits no breach of the law, yet if he does so make use of it, and causes damage thereby, he is liable to make compensation. An act which so causes damage is called a tort².

Carriers and innkeepers.

705. Certain special duties are imposed by the law upon particular persons or classes of persons, for example, upon innkeepers, and common carriers. If any person is damaged by a breach of these duties there is a liability to make compensation. An act which thus causes damage is called a tort.

Heterogeneous character of torts.

706. There are many other acts or omissions which are called torts, but the above enumeration is sufficient to show

¹ See the case of Peek against Derry, in Law Reports, Appeal Cases, vol. xiv. p. 337. As a general principle the law here laid down is, no doubt, right. But, nevertheless, there are many situations in which greater circumspection is required, and where persons who make false statements ought to compensate those who are misled, although there is no mendacity. But these are cases to be dealt with by the legislature.

² See *supra*, sect. 693.

how heterogeneous they are. The only common feature of the torts enumerated that I can discover is that they are acts forbidden by the law, which cause damage, and for which the law requires compensation to be paid. This is what I understand to be meant when it is said that in tort there must be *damnum et injuria*. *Injuria* means, I suppose, a breach of the law. The *jus* of which the *injuria* is a violation may be either a *jus in rem*, like a right of ownership, or a *jus in personam*, like the right to be compensated for a misrepresentation. It may be a right that the act which causes the injury shall not be done, or it may be simply a right to compensation, in which case the *injuria* consists in the refusal to make compensation. But the combination of *injuria* and *damnum* must be found in every tort. Still we have not found what we are looking for—a mark which will distinguish tort. This combination, though it is universally present in torts, will not serve to distinguish them. We find this combination also in breaches of contract and in breaches of trust¹.

707. There has been a disposition to make blameworthiness the connecting link between acts which are called torts. There are, no doubt, many acts which give rise to a liability to make compensation, and which are called torts, in which the conduct of the doer of the act is estimated, and is pronounced blameworthy. All cases of rashness and heedlessness are cases of this kind. The conduct of the person upon whom it is sought to fasten liability is tried by a standard which is furnished by the experience of the judge as to what sort of conduct may reasonably be required. The occasions upon which a person will be liable for rashness or heedlessness are chiefly occasions on which he and other persons are brought into contact in the exercise of their common rights: as, for example, when he and

Blame-
worthi-
ness.

¹ If there are any cases in which the courts allow an act to be complained of as a tort without damage, they are cases in which the real dispute is as to the existence of the right, and the action is allowed because, strange to say, our law does not always afford any direct way of trying the question whether a right exists or no.

others are using a common road ; or a common conveyance ; or when he has invited other persons to come to his house, or upon his premises ; or when he is employing or is employed by others ; or when he and others are engaged in a common employment. In these and other cases the law says that, if damage is caused by a certain want of attention to consequences which amounts to heedlessness, or by a want of caution in avoiding danger which amounts to rashness, it must be compensated.

708. There might be some convenience in classing together and enumerating the occasions on which a person would be liable for rashness or heedlessness by reason of some duty cast upon him by the law to be circumspect ; and it might be convenient to keep separate the occasions when the duty arose upon a contract, and those when it arose without a contract : and then we should want a name for the acts by which the liability was incurred, which name would cover a portion of the acts which are now called torts.

Specific
acts and
forbear-
ances.

709. Then there are other cases in which, instead of leaving the conduct of the person to be estimated by the tribunal which decides upon the liability, the sovereign authority has ordered certain precautions to be taken : as when a rule of the road is laid down ; or a railway company is directed to fence in its permanent way, or to use particular appliances for the safety of passengers. And many of these cases, no doubt, rest upon the principle that it is reasonable to require such precautions, and that the omission of them would be blameworthy. But it would be very difficult to make a separate class of such cases ; first, because the reasons which lead to such a command may not be all of one kind ; and secondly, because it would not always be easy to say what these reasons are.

Estima-
tion of
conduct

710. The estimation of conduct as an element of liability is of comparatively modern origin¹. The general practice in

¹ It has been suggested that the commands to make compensation for particular acts, which are to be found in the *Laws of Alfred*, were arrived

early times seems to have been to impose a liability to make compensation for specific acts done. And the mere doing of the act induced the liability, unless the party charged could establish some justification. Later on we get the more general expression 'trespass,' behind which lay, no doubt, the conception of rights of ownership and of rights of personal security. Still we have got no further than that an act was done which ought not to be done. Neither advertence to the consequences of an act as distinguished from the act itself, nor inadvertence to those consequences seems ever to have been taken into consideration. If it had been suggested that they ought to be considered, the answer, I think, would be that the attitude of the mind as regards the consequences was undiscoverable. Probably the Courts of Chancery set the example of considering the attitude of mind of the doer of an act as regards the consequences, that is, of inquiring whether he intended them, and also of estimating his conduct, as, for example, whether he had acted in good faith. The Common Law Courts at length felt themselves obliged to consider intention in matters of contract, and by degrees got also into the habit of submitting to juries questions of conduct, and the closeness with which the intention, or the knowledge, or the conduct of the party is scrutinised in courts of justice seems to me to be upon the increase.

711. It must also be remembered, that whatever may be the effect of blameworthiness in inducing liability in some kinds of torts, it is certain that there are many things called torts for which a person is liable to make compensation, in which, not only the element of blameworthiness, but even the element

All blame-worthy acts are not torts.

at by a process of specification from general rules. I can understand what is meant when it is said that the modern 'rule of the road' on land or at sea are arrived at by a 'process of specification' from a general rule forbidding negligence. But that any rule in the Laws of Alfred should have been so arrived at seems to me unlikely. Is it not rather true that in those days the only conception was of a specific rule to do this or abstain from doing that? See *The Common Law*, by Mr. Justice O. W. Holmes, p. 113.

of intention to do harm, is wholly absent. If I do any harm whatever to your land, whether I do so advertently or inadvertently is of no importance. The only question is whether the trespass is my act. Nor is it possible to trace the liability to make compensation in this case to blameworthiness. What lies at the back of liability in this case is not blameworthiness but ownership. On the other hand, I do not see how it can be asserted that there is now, or ever was, a rule or principle that mere blameworthiness gives rise to liability. Is there any general duty to abstain from acts which are malicious or negligent? or to make compensation for damage caused by acts which are malicious or negligent? I think none. Many times the law has said this thing or that thing shall not be done maliciously, this thing or that thing shall not be done negligently; that compensation shall be made for this or for that malicious or negligent act. But it has never said that nothing shall be done maliciously or negligently; or, that compensation shall be made for malicious and negligent acts in general. However malignant may be the motives which influence my conduct; however disastrous may be the consequences which I expect to result from it, I shall not be liable unless I have transgressed certain limits; which limits are marked out by the law. I have a fine spring of water on my land. For some years I have allowed it to run off in the direction of a neighbouring village, the inhabitants of which have come to depend on it mainly for their supply of water. From the most malignant motives, and hoping and expecting thereby to bring famine and sickness into the village, I dam up the stream in that direction, and turn it into another. Am I or am I not liable? The answer depends simply on whether the inhabitants of the village have by long enjoyment or otherwise acquired a right to the water; in other words, whether I have come under a special duty to abstain from any act which deprives them of it. If they have not acquired that right, and I have not incurred that special duty, I am not answerable under the law. If they have acquired that right,

then, however useless the stream may be to them—though my object was to supply another village which was perishing for want of water; though I may even have obtained a scientific opinion that the supply of water was sufficient for both villages—I shall still be liable.

712. So in the questions which so frequently arise between persons related to each other as master and servant. The servant may be exposed by the master to great danger which might be avoided, yet, if the servant knew of the dangerous nature of the employment, the master is not liable for any accident that may happen. Here it would be difficult, on moral grounds, to defend the conduct of the master in thus exposing his servant to danger, even with his own assent; and, as the master *ex hypothesi* knows of the danger, he must at least disregard the consequences, if he does not intend them. What draws the line is the master's duty as defined by the law. It is not the legal duty of the master to preserve his servant from risk in all cases in which it is immoral to expose him to it; nor is the master made liable either because he expects, or because he disregards, the consequences of the exposure: the law simply makes it his duty to take certain precautions to preserve his servant from risk, when the risk is one of which he knows but his servant does not.

713. It seems to me impossible to escape from the conclusion that the word 'torts' is used in English law to cover a number of acts, having no quality which is at once common and distinctive. In other words, I believe the classification to be a false one. Upon what intelligible ground do we apply the name of tort to damage done by trespass or by slander, or by fraud, and refuse to apply it to damage done by breach of contract, or by breach of trust? I think upon none. Nor can I see any advantage whatever in assigning the name 'torts' to a number of acts which have nothing in common except what they share with other acts not so called. It would certainly be desirable to cease calling by the name of torts all

Suggestion as to the use of the word 'tort.'

acts which have acquired other distinctive names—such as trespass, fraud, slander.

714. I suggested just now that it might be convenient to class together those cases in which circumspection is required, and in which the particular degree of circumspection is left in each case to the judge or jury to determine, and possibly if this classification were made it might be convenient to call acts in which liability was incurred through want of this circumspection by the name of torts. I am disposed to think that the acts do possess a quality which justifies their being classed together and which distinguishes them from other acts giving rise to liability. I am disposed to think that the occasions when they arise are occasions when people are brought into contact with each other, as by living contiguously, or by using the same conveyance or the same highway, or by the employment of, or by visiting, each other. These being the occasions, the conduct is estimated by the judges or the jury, as the case may be, in accordance with their experience¹.

714 a. If this nomenclature were adopted we should then, with the help of such terms as fraud, slander, and trespass, have a tolerably useful and comprehensive classification. Of course such a classification would be a very rough one. It does not, however, follow that it would be a useless one. I am inclined to be afraid of attempts at too much precision. What I have been chiefly arguing against is the sort of sham definitions and distinctions of which the books afford so many examples. There should, I think, be left great latitude to the tribunals in deciding whether where harm is done, compensation should be given: and I would resist the tendency which is, I think, at present, too strong in England, to let successive decisions on such a point as this grow into law.

¹ For a further discussion of these questions of conduct, and for a consideration of whether they are questions of fact or of law, I take leave to refer to an article in the *Law Magazine and Review*, 4th Ser. vol. ii. p 311.

715. I might even perhaps venture to suggest a definition of 'tort' which would adapt itself to these views. It might be declared that 'every person who on any occasion is required to use reasonable care and omits to use such reasonable care commits a tort.' The question whether or no the occasion was one requiring care ought not, I think, to be left to a jury to determine, but should be decided by the judge in all cases : and it would probably be inevitable, and perhaps not undesirable, that out of decisions *on this point* rules of law would grow. But no attempt should be made to determine by legal rules the standard of conduct by which the 'reasonableness' of the case is measured. That question should be left to the uncontrolled opinion of the jury, or of the judge, in cases where he had no jury to assist him.

716. A somewhat novel principle of liability has been lately suggested, which, if favoured, may grow to very large proportions. The particular cases which have occurred have been cases of fraud. *A* commits a fraud which damages *B* and *C*, who are both innocent. *A* is, of course, liable, but, as is frequently the case with fraudulent persons, he is insolvent. Thereupon *B* and *C* enter into a litigation in which the object of the plaintiff is to throw the loss on the defendant. The plaintiff fails to show that there has been any dereliction of duty on the part of the defendant; whereupon the court, instead of saying that the loss must lie where it has fallen, proceeds to consider which of the two parties enabled *A* to commit the fraud, and to hold that the loss must fall on that person. The liability is not placed upon the ground of misconduct, but of causation. If this principle were once acknowledged, the door would be open to a very large extension of legal liability ¹.

Liability
for damage
as between
innocent
persons.

¹ See the judgment of Chief Justice Cockburn in the case of *Babroch v. Larvon*, Law Rep., Queen's Bench Div., vol. iv. p. 394. It was quite unnecessary in that case to call in aid any such doctrine : see the case in appeal in vol. v. p. 284. The late learned Chief Justice seems to have thought that the right of an innocent purchaser to retain goods which he had bought, and of which he had obtained possession, from a person who

had himself obtained them by fraud, also rested upon the principle that the original owner had enabled the seller to commit the fraud. I should doubt the correctness of this view. At any rate it is quite a modern view. Until recently the view was that the innocent purchaser was owner, this being a case in which the ownership followed the possession. See the case of *Moyce v. Newington*, Law Rep., Queen's Bench Div., vol. iv. p. 35. See also *supra*, sect. 512.

CHAPTER XVII.

GROUND'S OF NON-LIABILITY.

717. IN analysing the nature of an act and the manner in which it produces legal results I considered in a very general way how these results were affected by certain abnormal conditions of the party who does the act. I will now consider a little more particularly the effect of these conditions upon that legal result which we call liability. Effect of abnormal conditions.

718. When the abnormal conditions of the party who does the act are such that the elements which constitute liability are not all present, then, of course, that liability does not arise. Where liability does not arise. For example, when a man by reason of being drunk fails to discover that a shilling in his possession is obviously bad, he cannot be guilty of uttering counterfeit coin, because the knowledge which is one of the elements of this particular kind of liability is wanting. In such a case drunkenness is not an excuse for crime, but the case is exactly the same as if the ignorance had arisen from the stupidity of the party charged. If the party is punished, he is not punished for uttering counterfeit coin, a crime which he has not committed, but for drunkenness, or some other offence. On the other hand, if a lunatic in a frenzy of passion kills his keeper, all the elements of the crime of murder are present; and if the liability to capital punishment does not arise, but only the modified liability to suffer imprisonment

during the Queen's pleasure, the case is one for our special consideration.

Where
liability
arises.

719. In the following observations I shall only deal with cases in which the elements of liability are present, and the ordinary liability would arise, were it not that the case is treated as an exceptional one.

Ways in
which
liability
may be
affected.

720. There are three ways in which the ordinary liability may be affected. It may either not arise at all ; or it may arise in a modified form ; or, having arisen in its usual form, it may be set aside or modified by the order of a court.

When
liability is
set aside or
modified.

721. Cases in which the ordinary liability arises, but is subsequently set aside or modified by the order of a court, must also be kept apart. They are dealt with differently from those in which the ordinary liability is prevented or modified in its inception. No doubt all these cases might be governed by the same or analogous rules ; but, as a matter of fact, courts of justice, when they modify or set aside a liability which has already arisen, exercise a large amount of discretion, guided to some extent by the examples of their predecessors as recorded in the reports, but not governed by rules constantly observed and capable of being stated in an abstract form. I shall therefore, for the present, confine myself to cases in which the ordinary liability is prevented or modified in its inception.

722. The abnormal conditions which I propose to discuss are insanity, error, intoxication, infancy, and duress.

Insanity.

723. Insanity—under which term I include all disorders of the intellect of a grave character—has been little discussed with reference to liability generally. It has been almost always discussed with reference to its effect on criminal liability. But in the main the principles of liability are the same in all courts, and therefore I shall refer here to the manner in which the questions of the liability of insane persons have been discussed in criminal courts.

Modern
ideas of it.

724. The ideas current on the subject of insanity have undergone very considerable modifications of late years. Indeed it is only in recent times that the subject has received

anything like the consideration which it deserves. Attention was first drawn to it by the horrible sufferings endured by insane persons in confinement. It apparently used to be thought that every insane person, who had physical strength and liberty to use it, was dangerous, and that the only way of rendering him harmless was by forcible restraint. The idea seems to have been that insane persons were under some sort of external impulse, which drove them to commit acts (as the phrase was) against their will. It is now known that, with rare and temporary exceptions, insane persons are susceptible of very much the same kind of influences as other persons. They can be made to feel the effects of discipline, and can appreciate, in a very considerable degree, the painfulness of reproof and the pleasure of approbation. The consequence is that, in the best asylums, the patients are seldom under physical restraint.

725. This discovery, though it has greatly mitigated the sufferings of persons subject to this calamity, has undoubtedly opened a new and difficult inquiry, whenever it has to be decided, whether or no the insane person is legally responsible for his acts. This mode of treatment clearly shows that the moral and intellectual qualities are hardly ever entirely effaced. The insane have in a great measure recovered their liberty, but with it also they resume, in part at least, their responsibility. How they affect liability.

726. It may be perhaps doubted, whether the recognition of this responsibility has kept pace with the increasing tendency to treat abnormal conduct as indicating some form or other of mental disease. It is also unfortunate that the law of insanity should have been to so great a degree fashioned upon the practice in one particular class of criminal cases. For in ordinary criminal cases this defence is rarely set up. The effect of setting up a plea of insanity in answer to a criminal charge, even if successful, is generally almost as disastrous to the accused as if he were to admit his guilt. Insanity itself is a stigma; and accused persons, if found Peculiar character of criminal cases.

insane, are liable to be imprisoned for an indefinite time; whereas ordinary convicts are only imprisoned for a specified period. Hence it follows, that few persons care to set up the defence except in capital cases, in which this defence is frequently insisted upon, strenuously enough; but even here, for the most part, only in that class of cases, in which murders have been committed under the influence of violent passion, without any attempt at concealment, and where any other defence is therefore hopeless. Now this is just the very class of cases in which the question of insanity presents itself under peculiar difficulties. The violent excitement under which the accused is labouring produces an extravagance of conduct very like that produced by insanity: indeed anger itself is so like madness as to be proverbially identified with it.

Grounds
of lia-
bility.

727. The question of liability in the case of insane persons cannot be determined unless we have first clearly settled in our own minds the grounds of liability in ordinary cases. Why do we imprison a man or require him to make compensation for damage which he has caused to another? Mainly I think in order to deter others from doing the like. Punishment of the deterrent kind is I think what is ultimately intended. Punishment in the shape of awarding compensation to the injured party is a very convenient form of proceeding, because it substitutes the action of the party for the action of the state, and satisfies a general sense of propriety which makes people in general willing to co-operate and assist in enforcing the penalty.

Why in-
sanity
prevents
liability.

728. Why then not punish an insane man? Would it not deter as many persons if an insane person, as if a sane person, were punished? The answer given by Lord Coke in the Third Part of his Institutes is that punishment inflicted upon an insane person would be so generally deemed inhuman and cruel as rather to make men desperate than to deter them from crime. Possibly this may be true. The deterrent effect of the criminal law is probably increased by the sentiment that it is, on the whole, humane and just. It is not unlikely

that a law which awarded a penalty to the actions of insane persons would be ineffectual, since no one either as a prosecutor or witness would assist in enforcing the penalty if he could help it.

729. In the majority of cases the non-liability of insane persons cannot be rested on the absence of the elements which constitute legal liability. It is indeed possible that a man's intellect may be so disordered, that he may altogether fail to perceive the consequences of his acts, whether to himself or to any other person. But in the majority of cases this is not so. All the essentials of legal liability will on examination be found to be present in nearly every case. Even the furious madman who kills his keeper because he is refused his liberty, conceives a wish which prompts him to do a certain act in order that he may accomplish the end which he has in view. He *intends* his keeper's death as means to that end, and every condition of the crime of murder is fulfilled.

Essentials
of liability
generally
not want-
ing.

730. But whatever may be the true ground on which the excuse of insanity is based, it cannot by any possibility be that which the form of the inquiry assumes in criminal cases when the accused person is alleged to be insane. The law requires that the question should be put to the jury in this singular form:—had the accused sufficient reason to know that he was doing an act that was wrong¹? What gave rise to this form of putting the question it is not very easy to discover. The capacity of distinguishing right from wrong has hardly at any period been accepted as a general test of insanity. Probably this form of putting the question is due to the notion which (as already mentioned) lurks in our criminal law, but which is never boldly asserted, and is sometimes emphatically denied, that the moral quality of the act determines the liability to criminal punishment.

Mode in
which
question
submitted
to jury.

¹ See the answer of all the judges, except Mr. Justice Manle, to questions put by the House of Lords, at the end of the answer to the second and third questions. These questions and the opinions of the judges thereon were printed by the House of Lords on June 19, 1848; they are to be found in most works on Criminal Law.

How dealt
with by
them.

731. It must be remembered, however, that this question has always to be answered in criminal cases by a jury—a tribunal which generally comes to the task without any previous training, and which is wholly incompetent to discuss with nicety the very peculiar and difficult question which the law requires to be placed before them. Probably, therefore, what really happens is that, consciously or unconsciously, the jury give their verdict according to their opinion upon a much more general question—namely, whether, under all the circumstances, the prisoner ought to be punished: and, where their decisions are not distorted by a special dislike of the punishment provided for the offence (as sometimes occurs in capital cases), the result is perhaps as good as any to which, in the present state of science, it is possible to attain¹. And at any rate the decision of a jury has this negative advantage; that, if unsatisfactory, it forms no precedent; on the contrary, the public condemnation which follows it serves as a guide and warning, for some time at least, against similar errors. It would, however, be somewhat better, if the question were submitted by the judge to the jury in a simpler form, so that his own remarks might be more intelligible, and more direct upon the point upon which their determination actually turns.

Insanity
as a ground
of non-
liability in
contracts.

732. The liability upon a contract, when one of the parties is insane at the time of the supposed agreement, may arise either, first, where the party is, or secondly, where he is not, capable of understanding the nature of the transaction. In the first of these two cases there may be true contractual liability; in the second there may be liability quasi ex contractu. Apparently, however, English lawyers ignore this distinction, and insist upon saying that insane persons can make a valid contract just like any one else, however disordered their intellect may be, upon the somewhat curious ground that no one is allowed to plead his own deficiency of intellect. But they

¹ See the somewhat similar observations of Lord Hale, *Pleas of the Crown*, vol. i. p. 32.

will not admit any liability either contractual or quasi ex contractu if the party seeking to enforce the liability knew of the other's incapacity: except in the case of necessities, for the supply of which the insane person is in all cases liable¹. Of course, however, if the insane man had been in any way overreached the courts of Chancery would interfere to protect him.

733. How far a person who is insane would be held liable, in courts of civil procedure, for his acts or omissions independently of contract, is a matter on which one is surprised to find our law-books nearly silent. Lord Hale lays down, however, a sweeping rule, which would entirely shut out this defence in such cases—that no man can, in matters of this sort, plead his own mental deficiency².

Insanity
as ground
of non-liability in
other
cases.

734. Error, in the shape of ignorance of the consequences of an act, or mistake as to the consequences which are likely to arise, of necessity renders it impossible for a man to intend or disregard those particular consequences; a man so ignorant cannot therefore incur any liability which involves such intention or disregard. But supposing the normal conditions of liability to be satisfied, will error prevent the liability from arising, or cause it to arise in a modified form?

735. Blackstone³ says that if a man intending to kill a thief in his own house, by mistake kills one of his own family, this is not a criminal action. But Blackstone's explanation of this is most extraordinary; and to me, indeed, altogether unintelligible. He says, 'for here the will and the

Ignorance
not a
defect of
the will.

¹ See the case of *The Imperial Loan Company against Stone*, Law Reports, Queen's Bench Div., 1892, vol. i. p. 599.

² *Pleas of the Crown*, vol. ii. p. 16. Even if this dictum of Lord Hale be accepted to the fullest extent, it would still be necessary to consider how far the elements which go to make up liability were present when the act was done; because the existence of these is alleged by the plaintiff, and must be proved before the defendant is called upon for his defence. If the plaintiff failed in this proof, it would still have to be considered whether there was a liability to make compensation, quite independent of intention or negligence; and perhaps what Lord Hale really means is that, as in contract, there is such a liability.

³ *Commentaries*, vol. iv. p. 27.

deed acting separately, there is not that conjunction between them which is necessary to form a criminal act.' Nothing can show more strongly than this confusion in the mind of so eminent a writer the importance of the analysis undertaken by Austin, of the relation between the mental consciousness of the actor and the act done. It is not very safe to attempt to assign a meaning to such a phrase as 'the will and the deed acting separately,' but I suppose it is another form of the erroneous expression so often met with, 'doing an act against your will.' The true view of the case I take to be this—Acts are produced by the will, by means of motions of our bodily muscles. But this exertion of the will, or volition, is the result of an antecedent desire. Thus, I take up a pistol, aim it at you, and pull the trigger, because I desire to kill you. I desire to kill you, because I believe that you are breaking into my house, and I consider it necessary to kill you in order to protect myself and my family. After I have fired, I find that you are a relative, coming to pay me an unexpected visit. My mistake as to your person has caused me to desire your death, which desire has acted upon my will. The same mistake has also led me to suppose that I was justified in killing you in self-defence.

736. There is, I think, no doubt that the case here put is one of murder, that is, that all the elements of murder are present, and if the liability to capital punishment does not arise, it is because of the abnormal condition of the person who fires the shot.

737. Whether any other liability than that to capital punishment will arise depends upon the circumstances. If I were not justified in assuming you to be a thief—if I were rash in drawing that inference, I might be guilty, though of a different crime. For rashness may be a ground of criminal imputation, and then the ignorance which is the result of that rashness cannot absolve me.

Will not
excuse an
act other-

738. So again where my mistake is not either rash or heedless, I may yet be liable in some cases. Thus suppose

I see in my neighbour's garden something moving in the trees, which I believe to be a wild, but harmless animal. wise unlawful.

I examine it very carefully, and satisfy myself that it is a wild animal. I fire at it, and it turns out to be my neighbour himself, who is dangerously wounded by the shot. Here I am clearly liable; and why? Because, though my mistake may be a reasonable one, yet, if all that I believed to be true, were true, my act would still be a breach of a primary duty, and the facts which I supposed to exist would not justify it. But not so in the case put by Blackstone. In that case, if all I believed to be true, were true, there would be an excuse for what would otherwise be a breach of a primary duty. There is a primary duty to forbear from taking life, but there is an exception where life is taken in self-defence. There is a primary duty not to fire guns into my neighbour's garden, and no exception where the object fired at is a wild animal. I am therefore liable to such consequences as are laid down by the positive law. I should be liable for manslaughter in England, because of the extremely sweeping definition of that crime; perhaps under the Indian Penal Code I should not have committed a crime, but I should be liable civilly.

739. The effect of error on the liability which arises upon contract is more complicated; and this complication is increased owing to its having been the custom to consider Ignorance or mistake in cases of contract. under this head several matters which do not properly belong thereto.

740. I have already adverted¹ to the mode which is generally adopted for ascertaining the intention of the parties in case of dispute. It has there been observed, that all a tribunal can do, after deciding upon the evidence what were the terms of the contract, after hearing the statements of both parties as to what each intended, and after inquiring into the circumstances which happened about that time, so far as they throw any light upon the intention—is to Inquiry sometimes shut out by rules of interpretation.

¹ Supra, sect. 622 sqq.

put upon the words its own interpretation, and from that interpretation to presume the intention. But in arriving at this presumption judges generally, as I observed, follow certain rules; such, for instance, as that the technical terms of law can never be used in any other than their technical sense, or ordinary words in any other than their ordinary sense, and so forth¹. So that a careless man may find himself fixed with an obligation arising upon a contract, which he did not intend, almost without having had an opportunity of asserting his mistake; and practically the excuse of error is thus very often shut out, upon grounds which stand apart from the general principles upon which that excuse depends.

Consensus
in idem
not in
question.

741. But suppose the court to have determined the sense of the promise and that the promisor *then* seeks to deny his liability on the ground of error. How will the court deal with it? Not surely upon the ground so frequently put forward that where there is error there is no consensus in idem and no contract. That, as I have just pointed out, is an antecedent question, the very question which arose in the well-known case of the 'Peerless.' There *A* agreed to buy and *B* agreed to sell a cargo of cotton to arrive 'ex Peerless from Bombay.' There being two ships of that name then on a voyage home from Bombay and both being laden with cotton, this was an accurate description of two different cargoes; and there being no circumstances from which the court could determine that in accordance with 'the sense of the promise'² either one or the other was meant, the sense of the promise remained undetermined, and there was no contract. Probably the plaintiff may have meant one of the ships and the defendant the other; but this alone would not have been conclusive; if the court could have determined that, according to the reasonable construction of the language used under the circumstances, one or other was meant, there would have been a contract in this sense.

¹ Supra, sect. 238.

² See supra, sect. 622.

742. Cases of this class are cases in which the parties have failed to use language to which any certain sense can be attributed, and therefore there can be no contractual liability. But if there has been a transaction in which one party has made a promise and the other has accepted it, and the sense of the promise can be determined, then all question of consensus ad idem is at an end. The sense of the promise determined upon may not be what both the parties or either of them expected, but this, as we have seen, does not prevent the contract from arising¹. Liability upon the promise in the sense attached to it will be taken to be the result contemplated. This is best seen by an example. A bar of metal which belongs to *A* is lying before *A* and *B*. *B*, asking no questions but relying on his own judgment, and thinking it is gold, offers to purchase 'that bar' at the market price of gold, which offer *A* accepts. In fact the bar contains a considerable amount of inferior metal, so much that merchants would not even call it gold. Still *B* is liable on the promise to purchase. If when sued by *A* he said that he made a mistake and thought the bar was a bar of pure gold, which he knew that *A* had in his possession and which he had examined carefully, he would not be listened to.

743. It used to be said that the question of error was differently treated in courts of Chancery and courts of Common Law; and if that were really so, now that all courts administer the same law, the only law which we should have to consider would be the law of the courts of Chancery. But I think the special doctrines of the courts of Chancery only affected the peculiar kinds of relief granted by that court—doctrines which assumed that the liability existed, but that

Error in
courts of
Chancery.

¹ Supra, sect. 621. No doubt it may be said that wherever one party contemplates one thing and the other party contemplates another, that is, in all cases of error, there is no consensus in idem. If so, every kind of error would render true contractual liability impossible. In practice, however, as I have frequently pointed out, the consensus is not arrived at by considering what were the expectations of the parties, but by considering what is the sense of the promise.

for some special reason it ought to be manipulated. It must be remembered that courts of Chancery used only to deal with contractual liability when the remedy at law was ineffectual: and in such cases these courts have always reserved to themselves a full discretion to determine whether under all the circumstances they would assist the plaintiff, or leave him to his ordinary remedy. No doubt, in considering this question, the courts have sometimes been influenced by the allegation that the defendant was asked to do something which he did not expect, but I do not think that any rules have been yet laid down which could be stated in an abstract form¹.

Error in
Roman
law.

744. The Roman law contains some rules on the subject of error which may, I think, be usefully referred to. The distinctions taken are clear, and lead to satisfactory results. They do not greatly differ from the English law, but are rather clearer. Error was divided into two kinds—error in substantiâ, and error in corpore. Error in substantiâ was a mistake as to some quality of the subject-matter in question, as, for example, thinking that a bar of metal was gold when it was really brass. It is assumed that the parties are agreed as to the thing—that there is no error in corpore, but only error in substantiâ. The juristic act, therefore, is complete, valid, and binding, in accordance with the maxim—*falsa causa non nocet*. And in many transactions, such as delivery of property, pledge, loan, &c., the error in substantiâ was quite immaterial, but in the contract of sale, letting and hiring, and some other cases in which special considerations of good faith

¹ See *supra*, sect. 721. Until recently the courts of Chancery were the only courts which could directly set aside or modify an existing contractual liability: so too they were the only courts which could order specific performance of a contract. Courts of ordinary jurisdiction could increase or reduce the damages, or could let the defendant go practically free by awarding nominal damages. But they did this without any principle. The result is that there is very little law in England as to the effect of error, and for the most part only examples to show how discretion should be exercised.

were applicable, the judge would consider whether the error ought to modify the legal liability¹.

745. The French law seems to treat error as a 'cause de nullité' of the contract, and to make no distinction between error in substantiâ and error in corpore. But I am still not quite sure whether it is meant that there is no contract at all, or one of which the result is modified².

746. There are some cases in the English law reports in which the grounds of the decision are somewhat difficult to follow, and which I will examine. Cundy against Lindsay³ was a case in which *A*, by fraudulently stating that he was *X*, induced *B & Co.* to sell him some goods. A contract was accordingly concluded by *B & Co.* with *A* in the name of *X*. In fulfilment of this contract *B & Co.* delivered goods to *A*, and *A* sold them to *C*, an honest purchaser, who accordingly obtained possession of them. Whether under these circumstances the ownership of the goods had passed to *C* does not necessarily depend upon whether or no there was a contract between *A* and *B & Co.*, but in this case the House of Lords thought that it did so depend, and decided that there never was any contract at all; which is, of course, very different from saying that there was a contract, although one affected by fraud. The words of Lord Cairns are:—'Of him (*A*) they (*B & Co.*) never thought. With him they never intended to deal. Their minds never for an instant rested on him: and as between him and them there was no consensus of mind which could lead to any agreement or contract whatever.' These

Error in French law.

Cundy v. Lindsay.

¹ Sohm's Institutes of Roman Law (Ledlie's translation), p. 136, from which the above paragraph is taken almost verbatim.

² 'Il n'y a point de consentement valable, si le consentement n'a été donné que par erreur. . . . L'erreur n'est une cause de nullité de la convention que lorsqu'elle tombe sur la substance même de la chose qui en est l'objet. Elle n'est point une cause de nullité, lorsqu'elle ne tombe que sur la personne avec laquelle on a l'intention de contracter, à moins que la considération de cette personne ne soit la cause principale de la convention.' Code Civil, Art. 1109, 1110. With the last clause compare the decision in Cundy against Lindsay.

³ Law Reports, App. Cases, vol. iii. p. 459.

words are wide enough to cover a very much larger class of cases than that under consideration—cases in which it had always previously been held that there was a contract which could be enforced. For example, if *A* had been wholly innocent of fraud, and *B & Co.* had still made a mistake about *A*'s identity, all that Lord Cairns says in the passage quoted would be just as true. Yet I do not think it has been generally said in English law that in such a case there would be no contract. There was a definite person *A* with whom *B & Co.* were in correspondence. If they erroneously assumed that *A* was *X*, I do not think that such an error has been generally considered to preclude the possibility of the existence of the contract¹. But in any case the ground of the decision is, not that because of error the liability on the contract must be set aside or modified, but that because of the error there was no consensus such as would make a contract.

747. In the case of *Boulton against Jones*² *A* had ordered goods of *B*. This order fell into the hands of *C*, and *C* executed it. It was held that there was no contract between *A* and *C*. This seems obvious; and it seems to me to be a very different case from one in which *A* gives an order to *C*, addressing him as *B*, when, if there were no fraud, there would, I imagine, be a good contract between *A* and *C* if *C* accepted the order.

748. In the case of *Smith against Hughes*³ the defendant had agreed to buy a specific parcel of oats of the plaintiff. The defendant thought that these were old oats: the plaintiff was aware that they were new. It was agreed that the erroneous opinion of the defendant as to the nature of the oats did not affect his liability. But it was said that if the plaintiff had known that the defendant in making the bargain with him for oats acted on the assumption that the plaintiff

¹ See the article of the French Code quoted above, from which it appears that under the French law an error as to the identity of the contracting party is in most cases immaterial.

² Reported in *Hurlstone and Norman's Reports*, vol. ii. p. 564.

³ Reported in the *Law Reports, Queen's Bench*, vol. vi. p. 597.

was agreeing to sell him old oats, then there was no contract by the defendant to buy new oats. This, however, is clearly not on the ground of error: there being as much or as little error in one case as the other. Nor is it so put in the judgment¹. I take it that both the actual decision and the decision in the hypothetical case proceed upon the same ground, namely, that under the circumstances the sense of the promise in the first case was to accept and pay for the specific parcel of oats whether old or new, and that in the second case the sense of the promise was to accept and pay for old oats only.

749. The case of *Conturier against Hastie*² has nothing whatever to do with error. It turned, as the Lord Chancellor Cranworth says in his judgment, entirely upon the construction of the contract, that is, upon the sense of the promise. The plaintiff had sold to the defendants a cargo of corn, described as being then on a certain ship on her voyage to England. Before the date of the sale the cargo, in consequence of its having become heated, had been landed and sold. This was not known to either party. The House of Lords thought that the intention of the parties was that there should be no liability under the circumstances which had occurred³.

¹ Sir James Hannen says that in the case supposed the plaintiff would have been 'aware that the defendant apprehended the contract in a different sense to that in which he meant it, and he is thereby deprived of the right to insist that the defendant shall be bound by that which was the apparent and not the real bargain.' See p. 610 of the Report, *ubi supra*.

² Reported in *House of Lords Cases*, vol. v. p. 673.

³ These are not the words of the judgment, but this is what must have been meant. Of course it was admitted that the defendants intended to buy something, and the plaintiff said that according to the sense of the promise what they sold and what the defendants bought was, 'not the cargo absolutely as a thing assumed to be in existence, but merely the benefit of the expectation of its arrival, and of the securities against the contingency of its loss.' The cargo was insured, and this was quite an intelligible and not an unreasonable construction of the contract; though, as the court thought, not the right one. The case of *Strickland against Turner* (which is said to be like *Conturier against Hastie*, as it is in some

750. The perusal of these cases does not encourage me to attempt to lay down any general rules on the subject of error as affecting liability in contract. They show very clearly the importance of keeping separate the three questions, (1) was there a contract? (2) if so, what are its terms? and (3) is there any reason why the liability on it should be annulled or modified? The circumstance that one of the parties was under an error when the contract was being negotiated may be an important consideration in determining whether or no the contract exists; but it being once determined that every error is not fatal to the existence of the contract, I think the courts must be left in each case to decide whether or no, notwithstanding the error, the existence of the contract is established. The consideration of this point is apt to slide over to a consideration of the second question—what was the sense of the promise? because when that is determined the question of error as affecting the existence of the contract often becomes immaterial. As to the third question, I doubt if there is any case in which error has been successfully pleaded in answer to an action on a contract, when the court has once determined that there was a contract and has ascertained its meaning. The only resource then left to the defendant is in some discretionary power of the court either to hold its hand or to set aside the transaction. This is a power which is called equitable, and is not exercised under fixed rules.

Intoxica-
tion.

751. Intoxication is a disordered state of the intellect, produced by eating or drinking something. Blackstone says it is rather an aggravation of the offence than an excuse for criminal misbehaviour; and that the law will not suffer any man thus to privilege one crime by another¹. The Indian Penal Code says²: ‘In cases where an act done is

respects) also turned entirely upon the sense of the promise. It is reported in *Exchequer Reports*, vol. vii. p. 208.

¹ Commentaries, vol. iv. p. 26. I doubt whether the passage of Lord Coke to which Blackstone refers as an authority for this position, has been correctly understood by him. See *First Part of the Institutes*, p. 247.

² Sect. 86.

not an offence, unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with, as if he had the same knowledge as he would have had, if he had not been intoxicated, unless the thing which intoxicated him was administered without his knowledge and against his will.' The English rule is intelligible, though the reasoning by which Blackstone supports it is worthless. Drunkenness in itself can hardly be said to be a crime under English Law¹; and even if it were, it is simply begging the question to say, that when a man pleads drunkenness, he thereby seeks to privilege one crime by another; the whole question being, whether or no that other act is or is not a crime. The Indian rule is very difficult of comprehension. I am not quite sure what is meant by 'a particular knowledge or intent,' but I suppose setting fire to a house is an offence, though not done with any *particular* knowledge or intent; yet it is not at all likely that intoxication was intended to be an excuse in such a case. On the other hand, passing counterfeit coin is clearly an offence in which a particular knowledge is necessary; namely, knowledge that the coin is spurious; and therefore, a drunken man who takes a counterfeit coin, which he would certainly have discovered to be counterfeit if he had been sober, and pays it away without discovering it, might under this provision be convicted of passing counterfeit coin knowing it to be counterfeit. But this result seems very remarkable.

Erroneous reasoning of Blackstone.

Rule of Indian Penal Code obscure.

752. The question, how far intoxication affects liability, can never, I think, be satisfactorily settled by presuming that things are different from what they really are. If the state of mind which we call knowledge or intention is essential to the breach of the duty or obligation in question, the first consideration will be, whether or no the

True effect of excluding the defence of intoxication altogether in criminal cases.

¹ It is an offence punishable by a fine of five shillings under 21 James I. chap. vii. sect. 3. But simple drunkenness, independently of any other consideration, is very rarely, if ever, punished.

drunkenness was such as to have prevented the possibility of such a state of mind. It is perfectly consistent with very great drunkenness, that a man should know and intend the consequences of his acts. A soldier who after a day's hard drinking discharges his musket in the face of his sergeant, may know and intend the consequences of his act, just as well as the jealous lover who stabs his rival in the arms of his mistress. Indeed it is hardly possible to preserve the physical capacity to execute this sort of crime, without also retaining the low degree of intelligence which is necessary to the offence. But, if that is not the case; if the drunkenness is such that no offence can have been committed, or not the particular offence with which the person is charged; then the true effect of presuming knowledge or intention, in spite of the facts, is to make drunkenness itself an offence, which is punishable with a degree of punishment varying with the consequences of the act done¹.

Intoxication in other cases than crimes and breaches of contract.

753. How far intoxication affects the liability of a man, in a court of civil procedure, to make compensation for damage done, has been little discussed. The same distinction would be here necessary as in considering criminal liability. If the liability be such that the state of mind is a necessary element of it, then the person pleading intoxication may, or may not, have that state of mind. If he has it, then he is liable like any other person. If he is so intoxicated that he cannot have it, then, if liable at all, he is liable because there is a law, which makes men liable for what they do when drunk, independently of any consideration of their state of mind when they did it.

Intoxication in contract.

754. In cases of contract, an intoxicated man may, or may not, have the degree of intelligence necessary to agree

¹ It would appear from a passage in Lord Hale that some lawyers have thought that the formal cause of punishment *ought* to be the drunkenness, and not the crime committed under its influence. Pleas of the Crown, vol. i. p. 32.

upon the terms of a contract; and this would be a matter of inquiry. But here a different principle intervenes. A man who is intoxicated generally shows it; and there is this exception to the law that contracts will be enforced, that a contract made with a man who is apparently drunk will not be enforced. The sovereign authority, for good reasons, has decided that people ought not to attempt to transact business with persons whose incapacity to exercise sound judgment is thus apparent.

755. The rules which govern the liability of infants and Infancy. minors have varied considerably in different countries. They have had their origin mainly, but not exclusively, in considerations of intellectual deficiency. They have been founded sometimes on the necessity of subjecting young persons to parental or other control; sometimes on their physical incapacity to go through certain forms; and not unfrequently on their incapacity for sexual intercourse; but the most prominent consideration has, of course, always been the absence of that knowledge and experience which is necessary to enable any one to appreciate the consequences of his acts. Traces of all these principles may be found in the Roman, the English, the Hindoo, and the Mahommedan Law. But it is obvious that an inquiry into either physical or intellectual capacity would be both difficult and inconvenient; and consequently, the necessity for this inquiry has been to a great extent superseded, by laying down certain fixed rules as to liability, based simply upon the age of the person sought to be made liable.

756. The rules vary somewhat in different countries, and they also vary with reference to the nature of the duty or obligation which is in question. As regards acts which lead to penalties or forfeitures under criminal procedure, a child cannot, under the Indian Penal Code¹, be made liable until he has attained the age of seven years. Above seven years and under twelve the child will not be liable unless he

Criminal cases.

¹ Sect. 83.

has attained sufficient maturity of understanding to judge of the nature and consequences of his conduct. This means that he will generally be considered not to have attained that condition; but he may be shown to have done so. The Law of England is substantially the same, except that fourteen years is substituted for twelve. The French Code provides that, wherever the accused is under sixteen years of age, there must be an inquiry into what is called his discernment¹.

As regards those acts which are usually called torts or delicts, the consequences of which are liability to make compensation, or some other obligation of a civil kind, they would probably be dealt with upon the same principles as acts which are punished criminally.

Contracts. 757. As regards contracts, the law is very favourable to young persons. Up to a certain age, which in European countries is usually fixed at twenty-one, they are not generally liable to obligations created by way of contract, though they can sometimes compel persons who have made promises to them to perform them. But though the minor cannot by his own act incur any obligation, there is generally some person, his father or mother, or a person specially appointed for the purpose, and who in this relation is called his guardian, who can make, under certain circumstances, valid contracts on the minor's behalf. Moreover, a minor, on attaining his full age, may sometimes ratify, either expressly, or by acknowledging their existence in any other way, contracts made by him when under age. A minor may also generally make a valid contract to pay for the necessities of life. In India the same general principles apply to contracts made by minors as in Europe. The age of majority is however there fixed at eighteen for some purposes, and at twenty-one for others².

Duress, 758. We now come to another matter, upon which there has been no little confusion, owing to the inconsiderate use of terms. We constantly hear people speak of a man doing

¹ Code Pénal, Art. 66.

² See Act ix. of 1875.

an act against his will, and lawyers discuss the validity of an act done against the will. But if we use language with the precision which is absolutely necessary in order to deduce legal consequences, and revert to the analysis above given of the relation between the will and the act (the only one which appears to me to be rational), it will be at once apparent that to say that a man has done an act against his will, is a flat contradiction. If I thrust a gun into your hand and force your finger on to the trigger, it is I who fire the gun and not you. You do not do an act against your will. You do no act at all. On the other hand, if I present you a document for signature, and inform you that unless you sign it I shall blow your brains out, producing at the same time a pistol to convince you that I am in earnest; whereupon you take up the pen and sign; in that case you sign in accordance with your will, and not against it. What I have operated upon is not your will, but the desires which influence your will. I have never deprived you, nor can I ever deprive you, of the power of freely choosing whether to sign the paper or to be shot through the head. Knowing that you have a strong desire to live, I put you in a position in which, in order that that desire may be accomplished, you must do an act which you otherwise desired not to do. I might be mistaken. Your repugnance to the act might be so great that death would be preferable. Many a woman has preferred death to yielding up her virtue.

759. This will be seen more clearly if we compare this case, which most people would describe as an act done against the will, with a case which would not be so described, but which will be found on examination to stand on precisely the same grounds. I am a prisoner in the hands of a cruel enemy, who I feel certain will take an early opportunity of putting me to death. I have the chance of speaking to you, and promise you a thousand pounds if you will carry a message to one of my friends, who, I feel sure, will come to

my aid when he learns my situation. It is exceedingly painful to me to expend so large a sum of money, which I can ill spare, and I would gladly avoid doing so. But I fear to lose my life, and you will not take less, so I sign a promise to pay that amount. No one would speak of this as an act done against my will; and yet the condition of my will, in this case, is precisely the same as that of yours, in the former case. In each case the will is influenced by conflicting desires—the desire to live, and the desire to avoid an act; the desire to live preponderates, and we act accordingly.

760. Having removed this misconception, let us see how the improper influence upon the desires, which is called duress, affects the liability which arises out of an act. As in all other cases, it is only by an examination of the law which creates the primary obligation, that we can discover this. Under what circumstances does the law create obligations upon contracts which have been entered into by persons under what is termed duress?

Real cases
of duress
as a ground
of non-
liability.

761. A great many cases of so-called duress may be got rid of upon a very simple ground. If a promise made under the influence of duress be for the benefit of the person who has used the improper influence, this person will not be allowed to enforce the promise, on the ground that no one can be allowed to take advantage of his own wrongful act. But there are undoubtedly cases in which a promise will not be enforced, though the promisee be wholly innocent. Thus if a friend of mine asked you to lend him a thousand pounds, and I, wishing his request to be granted, threatened to take your life unless you signed a promise to pay him the money, the promise would not be enforced, although he and I were not acting in concert.

Rules
which
govern
these
cases.

762. The principles upon which the sovereign authority will refuse to enforce a promise in such cases have not, as far as I am aware, been very exactly stated. If a judge has to decide such a case he would generally consider a good

deal, what under all the circumstances appeared to be just and proper. Three rules appear however to have been adopted. First, the danger to be avoided must be of a serious kind, that is, danger to life, or limb, or liberty, either of the person himself, or of his wife, or of his children. Danger of losing one's good character, or of injury to one's property, is not considered sufficiently serious. Nor is the danger of being sued in civil process, or of being charged with a crime. Of course I mean not sufficiently serious to justify the non-performance of a promise made to an innocent person. Should the person who threatens the danger himself seek to enforce the promise, the case would, as I have pointed out, be treated on different principles.

Secondly, it is necessary that the danger should be of something which a person of ordinary constancy and firmness may fairly expect to happen; and the act must be one which a prudent man would do, to avoid the danger.

Thirdly, the escape from the anticipated harm, by making the promise, must be suggested by some one other than the promiser himself, and the act must be the direct consequence of the suggestion.

763. The effects of duress upon criminal liability, and upon civil liability independently of the agreement of the parties, has never, as far as I am aware, been discussed. Cases of this kind are of rare occurrence, and are frequently capable of being solved on other principles.

764. In discussing the effect upon his liability of the abnormal condition of the party who does the act, I have ^{Use of the word} 'void,' guarded myself against the use of the word 'void,' in order to prevent misconception. There are cases, no doubt, in which the act does not produce the usual liability, or even by itself any liability at all. But it does not follow from this that the act is devoid of all legal results. We have a very strong example of this in the case of infancy. The statute which protects infants in cases of contract uses the strongest language upon this point. It says that the

promise of the infant is absolutely void¹, as if it meant to make it a simple nullity. But is it so? The infant if sued on the promise is put to his plea. He may defend himself by alleging his infancy: but if he does not specially allege this defence he will be found to be liable. A bare denial of the contract will not help him, as it certainly should if the transaction were a nullity².

Fraud.

765. Fraud is error produced by mendacity. It is, therefore, a particular case of error. But it requires separate consideration, because the effect of error on liability which arises upon a contract is largely affected by the consideration of whether or no it was created by a mendacious statement.

766. In contract, if *A* sues *B* upon a contract which originated in an agreement induced by fraud, and *B* pleads simply that no contract was entered into, it is certain that the court, even though the fraud appear, will hold that there was such a liability. If *B* pleads that he was induced to agree by fraud, and proves it, the court will under certain conditions give judgment in his favour. But whether upon the ground that there never was any contractual liability, or upon the ground that this contractual liability will be set aside because of the fraud, it is not always easy to determine.

767. As far as the defendant is concerned, the result is the same whether the court says there never was any liability or unconditionally removes that liability. But to other persons it may be of enormous importance: this is well illustrated by the case of *Cundy against Lindsay* which I have above stated³.

768. In *Cundy against Lindsay* the property had actually been delivered, and (though this seems to have been disregarded) it was quite possible to hold that by the delivery the ownership was transferred, although by reason of the fraud no liability arose out of the contract which preceded

¹ 37 & 38 Vict., c. 62, s. 1.

² Simpson on Infants, p. 500.

³ *Supra*, sect. 746.

the delivery. But take a case where *A* by fraud induces *B* to agree to sell him a house, and then *C*, who acts perfectly honestly, before the conveyance is executed, agrees to purchase the house from *A*, and pays him the money. It makes all the difference whether the contract of *B* to carry out the purchase was never created, or whether it will be set aside. If it was created, then no court would set it aside without considering the position of *C*, and how he would be affected by the order. But if no liability at all was created by the transaction, then there would be no room for such a consideration as this. If *B* were sued on the contract he would simply prove the non-existence of his liability, and *C* would be left to any remedy he might have against *B*.

769. The question whether fraud prevents the existence of the contract, or whether it is a ground for not enforcing it, or for enforcing it conditionally, or with some modification, is, notwithstanding its importance, very often left in obscurity. Many writers lay down broadly that fraud prevents the consent of the party defrauded from being a real or sufficient consent, meaning thereby (apparently) that it prevents the existence of an agreement. But I think that, with the exception of *Cundy against Lindsay*, this is very rarely held to be the case. And I observe that those who deny the reality of the consent, do not always adhere to this denial. This contradiction is very apparent in the Indian Contract Act, where after saying that where there is fraud there is no real consent it is said a little later that there is in the same case not only an agreement but an enforceable one, that is, a 'contract' in the language of the Code¹.

¹ See sects. 10, 14, 19, and the definition of contract in sect. 2 (*h*). The word used in the Indian Contract Act is not 'real' but 'free.' Consent induced by fraud is said to be not free.

CHAPTER XVIII.

SUCCESSION.

Origin of
law of suc-
cession.

770. THERE are few institutions of law which can be fully understood by considering them as they exist at any one time, or in any one place. This is specially true of that head of law which is dealt with in this chapter, and I will therefore attempt to state how our present notions as to succession originated.

Meaning
of succes-
sion.

771. I will first explain generally what I mean by the term succession. Every member of society has an infinite variety of rights and is subject to an infinite variety of obligations. He has property in his own possession; he has property in the possession of others; the law has bound him to other persons, and has bound other persons to him; he owes money to some, others owe money to him; he has of his own accord entered into engagements of various kinds with various persons, and bound various persons to himself by contracts; many of these obligations on either side remain unperformed. Thus a man carries about with him (so to speak) a vast mass or bundle of rights and obligations, which are attached to himself, in the sense that they are conceived as binding *him* or belonging to *him*. This mass or bundle of rights and obligations the Roman lawyers called a man's *jus*. What becomes of these rights and obligations when the person dies to whom they are attached?

Do they also perish? If not, on whom do they devolve? That is determined by the law which I am about to consider—the law of succession.

772. It is frequently said that the law of succession rests entirely upon fictions; and this portion of the law has accordingly had to sustain many attacks upon that weak side which all institutions based upon fictions present. How far the statement that the law of succession is based upon fictions is true will appear when we examine the conceptions from which it has been derived. How far based on fictions.

773. The first main conception which underlies the modern law of succession cannot be seized without a little preliminary consideration of a term of the Civil Law, which contains the idea whence all our conceptions of succession originally sprang, though it has been to some extent departed from. I have already said that the problem to be solved is, what becomes of the rights and obligations which are attached to a person when that person dies; and I have now to explain that these rights and obligations have been frequently conceived, not separately, but as a whole. And this mass or bundle of rights and obligations attaching to a man being conceived, and dealt with as a whole, it has been natural to give to it a name. The name given to it by the Civil lawyers was *universitas juris*. *Universitas juris.* Sir Henry Maine has thus explained this term¹:—‘A *universitas juris* is a collection of rights and duties united by the single circumstance of their having belonged at one time to some one person. It is as it were the legal clothing of some given individual. It is not formed by grouping together *any* rights and *any* duties. It can only be constituted by taking all the rights, and all the duties of a particular person. The tie which so connects a number of rights of property, rights of way, rights to legacies, duties of specific performance, debts, obligations to compensate wrongs—which so connects all these legal privileges and

¹ Ancient Law, first ed., p. 178.

duties together as to constitute them a *universitas juris*—is the *fact* of their having attached to some individual capable of exercising them. Without this *fact* there is no university of rights and duties. The expression *universitas juris* is not classical, but for the notion jurisprudence is exclusively indebted to Roman law; nor is it at all difficult to seize. We must endeavour to collect under one conception the whole set of legal relations in which each one of us stands to the rest of the world. These, whatever be their character and composition, make up together a *universitas juris*; and there is but little danger of mistake in forming the notion, if we are only careful to remember that duties enter into it quite as much as rights. Our duties may overbalance our rights. A man may owe more than he is worth, and therefore if a money value is set on his collective legal relations he may be what is called insolvent. But for all that the entire group of rights and duties which centres in him is not the less a *juris universitas*.¹

Owner-
ship origi-
nally cor-
porate.

774. Another conception which, though it cannot be said to belong to the modern law of succession, yet underlies that law in every part, is that of corporate ownership. It has already been intimated¹ that according to the first notion

¹ Supra, sect. 326. I venture to retain this opinion notwithstanding the emphatic condemnation of it by two very learned persons in a recently published work (Pollock and Maitland, *History of Early English Law*, pp. 242, 245), and I do so for the following reasons. Family ownership, in the form in which it prevails in the greater part of India, is, I think, correctly described as corporate. Every member acquires his rights by birth alone: there is perpetual succession: there is no inheritance: until partition there is no sense of the word in which a single member can be said to be owner of more than a possibility of acquiring something. It is true that on a partition he would get a share, and what share could at any given moment be ascertained, but I am at a loss to see how that makes him an individual owner of anything. The same is true of every trading corporation. Further, if family ownership in India may be correctly described as corporate, there is little remaining doubt that corporate ownership is older than individual ownership. The conception of family ownership which prevails in one part of Lower Bengal, under which each member of the family is owner of his share, is generally admitted to be a modification of the more prevalent form. Individual

of society, at any rate according to the first Aryan notion, ownership in general was not individual, but corporate. Property belonged not to an individual, or a determinate set of individuals, but to an aggregate of persons, such as a family or tribe. But such corporate ownership is just the case in which the difficulty about succession vanishes. The rights and obligations are in this case attached to the corporate body, and the existence of the corporate body to which the rights and obligations are attached is in no way affected by the death of individual members of the corporation.

775. Nor is this view of succession confined to those corporations which are composed of an aggregate of individuals, such as a family, or a municipality, or a trading company. Precisely the same takes place where the corporation is represented by a single individual, or, as it is termed in English law, is a corporation sole; such as the king, the parson of a parish, or the priest (*shebait*) of a Hindoo idol. It is not the particular incumbent of the office in whom the property is vested, and to whom the obligations attach; it is the Crown, or the Church, or the Deity; or some abstraction of that kind, of which the king, the parson¹, or the *shebait* is only the representative.

776. ² Now once having seized the idea of a *juris universitas* and of a corporation, especially of a corporation sole, there need not be any difficulty about mastering the conception of succession. There is a reasonable probability that the idea of in-

ownership probably had its origin in separate acquisition. The reduction of a family by death or partition to a single person does not really introduce individual ownership. Such a person strongly resembles a corporation sole. His son at birth becomes co-owner with him. Of course these ideas in regard to ownership were not conceived by Hindoos in their abstract form: nearly everything was covered by the simple rule (and even this was nowhere expressed), that the members of a family had no rights *inter se*.

¹ So called because he is said *vicem seu personam ecclesiae gerere*. Coke upon Littleton, 300 a; Blackstone, Commentaries, vol. i. p. 384.

² I may here refer generally to Maine's *Ancient Law*, chap. vi, where the early history of testamentary succession is most ably and learnedly discussed.

dividual succession grew out of the idea of corporate succession, and, although the transition is considerable, there is no reason to suppose that it was a violent one, or that it was even perceived. The corporate ownership of the family no doubt contracted to the individual ownership of the father, not suddenly, but gradually : and so too with succession. The father had been the sole manager and representative of the family whilst ownership was still corporate ; and whether one individual succeeded another as owner or as manager would not become apparent until long after rights of individual ownership had become well established and familiar. A change from corporate to individual succession, therefore, like the corresponding change from corporate to individual ownership, would produce no external change of itself ; and one transition would proceed as an unconscious development of the other. There was, it is true, a new question to be solved, but it is very likely that nobody asked it ; and no one, even if it had been asked, would have doubted about the answer. There was nothing to be done except to let things go on as before. The old head of the family being dead, the new heads of families would take his place ; whether as managers on behalf of their respective families, or on their own behalf, would make no external difference. It was only after the notions of personal obligation and personal ownership had been fully established, that it would occur to any one to ask how, when the person is dead, can the rights and obligations which were attached to his person continue ? Then only would the continuation of his existence in the person of his heir come to be questioned ; and the doubt, if necessary, resolved by a fiction that the ancestor's existence was continued in the person of the heir.

Continuation of existence of ancestor in person of heir.

777. It appears to me, however, at least open to question, whether the continuation of existence in the person of the heir, which we now call a fiction, was not in earlier times stated as a solemn physical truth. It is difficult otherwise to account for the broad and general terms in which this

continuation is appealed to as a fact; not only by Roman lawyers, but by lawyers of other countries. The Hindoo lawyers when discussing the rights of succession seem to assert the physical identity of father and son, and also of father and daughter quite as strongly; and, whenever they have to deal with a disputed question of succession, treat this identity as a self-evident truth. Thus *Manu* says:—‘The son of a man is even as himself, and as the son is, such is the daughter. How, then, if he have no son can any inherit but the daughter, who is closely united with his own soul?’¹ Nay, even when dealing with the rights of a widow, the great contest as to her right of succession seems to have been settled by the observation that ‘Of him whose wife is not deceased, half the body survives. How then should another take his property while half his person is alive?’² Similar strong expressions of complete physical identity also occur frequently in the Bible. The legend of *Eve* having been formed out of a rib taken from *Adam*; the latter’s exclamation on seeing her, ‘This is now bone of my bone, and flesh of my flesh’; and the frequent assertion by blood relations that they are to each other as bone of the bone, and flesh of the flesh, even by those connected through females, are at least very remarkable³.

778. Continuation of the existence of the ancestor in the person of the heir is, it is true, not the only ground of inheritance recognised. Amongst the Hindoo lawyers of the Bengal school, whose principal authority is a treatise called the *Dayabhaga*, the notion that spiritual benefits are conferred

¹ Chap. ix. verse 130.

² *Dayabhaga*, chap. xi. sect. 1, verse 2. But the strongest passage of all, perhaps, is in the *Mitacschara*, chap. i. sect. 3, verse 10: ‘The woman’s property goes to her daughters because portions of her abound in her female children; and the father’s estate goes to his sons because portions of him abound in his male children.’

³ *Genesis* ii. 23, xxix. 14; 2 *Samuel* v. 1, xix. 12, 13; *Judges* ix. 2; 1 *Chronicles* xi. 1. In *Genesis* xv. 4 it is said, ‘He that shall come forth out of thine own bowels shall be thine heir.’

by the heir upon the ancestor enters largely into their conception of succession. This notion is based upon three assumptions: (1) that the deceased is benefited by his wealth being expended on the performance of certain ceremonies; (2) that it will be so expended; (3) that the extent of the benefit depends on the relationship of the deceased to the person who performs the ceremonies. The last determines the order of succession. The second was, of course, only applicable to the scanty wealth men formerly used to leave behind them, and though the ceremonies are still performed somewhat lavishly, they do not now necessarily absorb nearly all the accumulated property of the deceased. It is not improbable that the original practice was to apply all the available wealth of the family to the performance of family ceremonies and the perpetuation of family *sacra*; and thus what was originally a mere family duty has become a profitable right. Though from a legal point of view the duty has now dwindled into a fiction, it was once real; and it still supplies a not unjust rule of inheritance, based mainly upon propinquity and a preference of males to females¹.

779. But in the Mitacshara, which is supposed to be older than the Dayabhaga, and is of far wider authority², the right of succession is nowhere placed upon the ground of spiritual benefits conferred. The author of this treatise rests his propositions for the most part upon the bare rule of propinquity; and though he recognises the offering of funeral oblations as a distinctive mark of one class of relations (*gotraja*) and perhaps of others, he does not treat this as an essential condition. He has apparently heard of the notion but rejects it; as well as the more general assumption that accumulated wealth can only be used for religious purposes³. This is probably the reason why the author of the Dayabhaga

¹ See Dayabhaga, chap. xi. sects. 5 and 6.

² Colebrooke's Law of Inheritance, Preface, pp. iv. and xii.

³ See Mitacshara, chap. ii. sect. 3, verse 4, and sect. 5, verse 1; and compare sect. 1, verse 14, with verses 22, 23.

discusses and defends the doctrine of spiritual benefits at such great length. I may observe that the authors of both treatises consider the little that the Code of Manu says upon the subject favourable to their views ¹.

780. The law of succession as developed under the combined influence of Brahminical law and the decisions of English judges in India presents many features of remarkable interest. Starting, apparently, from the same point as the law of Europe, namely the corporate ownership of families, and asserting, as I have already shown, quite as strongly the physical unity of kindred, the Hindoo law of succession down to the present day is still in close connexion with the law of the family. In the west, even in ancient Rome, on the death of the head of the family each son became the head of a new family, and there were as many new families as the deceased left sons surviving him. But this was not the case in India in earlier times, nor is it so even now. Throughout India the death of the father leaves the family single and intact. If he were a sole owner, his heirs become either corporate or joint owners of his property, and so remain until a distinct act of separation takes place; and the feeling is rather against than in favour of such a separation. If the father was himself a member of a joint family, all his descendants are so too; the property before and after his death being held in common. So long as the family remains united there is a common purse into which, and out of which, everything is paid, without any account being taken of the individual contributions or expenses; the fund itself, and the expenditure from it, being under the control of the family, generally represented by a manager. This is so even in Bengal where the members of the family are the individual owners of their shares. Individual rights are dormant. It is only in case of

Law of
succession
in India.

¹ See Manu, chap. ix. verse 186 sqq., and compare verses 106 and 142. See also Mitacshara, chap. ii. sect. 3, verses 3 and 4; and Dayabhaga, chap. xi. sect. 5, verse 6 sqq.

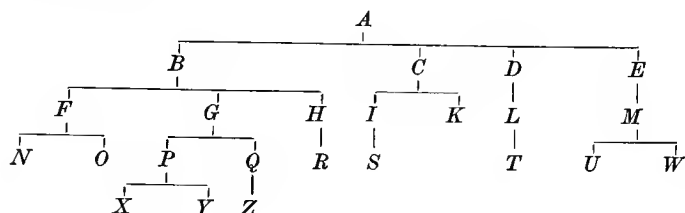
collision between the members of the family, leading to a disruption, that any question as to individual rights arises; and then it first becomes really important whether the members are joint owners or a corporation. The change, therefore, from corporate ownership to individual ownership has been a very slow one in India, and it is not even yet complete. It is still denied in some parts of India that the individual members can dispose of anything: and, even if they can, a partition is necessary to give effect to the disposition. This explains the curious place that the law of succession occupies under Hindoo law. We in Europe have long been accustomed always to deal with the law of succession as connected with the rupture of the family by death; the Hindoo lawyers deal with it as connected with the rupture of the family by partition. It might be said that there is in fact no Hindoo law of succession, but only a law of partition. The two great treatises which Colebrooke has translated, and which are commonly said to contain the Hindoo law of inheritance, really deal with a subject for which the Sanscrit term is *dayabhaga*; and this, as the authors of both treatises are most careful to explain, means, not inheritance, but the partition of wealth¹.

Division
of family
into
groups.

781. Probably the oldest form of succession, though it is now almost completely effaced, is that which is based upon a division of the family into groups of male agnates, each group

¹ *Dayabhaga*, chap. i. vv. 1-5; *Mitaeshara*, chap. i. sect. 1, vv. 1-6. Lassalle has pointed out the difference between the (so-called) intestate succession of the early German law and the intestate succession of Rome. There is a very remarkable similarity between his description of the German law and the Hindoo law as it appears in the *Mitaeshara*. See *Syst. d. Erwerb. Rechts*, vol. ii. Part ii, especially pp. 583 sqq. Compare also the following remarkable passage: 'In suis hereditibus evidentiuss apparet continuationem domini eo rem perducere, ut nulla videatur hereditas fuisse, quasi olim hi domini essent, qui etiam vivo patre quodammodo domini existimantur. . . Itaque non hereditatem percipere videntur, sed magis liberam bonorum administrationem consequuntur.' Dig. 28, 2, 11. This looks as if there were traces at Rome of a system similar to that of the Hindoos and early Germans.

consisting of a man and his descendants, and each group having been, originally, a corporation. The whole family, and any portion of the family whose lines of descent meet in a common ancestor, forms a group of that kind. Thus, suppose the following diagram be taken to represent the male agnates of a family:—



A and his descendants will form the largest group, which for brevity we may call the group *A*. Another group will be formed by the descendants of *B*, which we may call the group *B*; and in like manner we have groups *C*, *D*, *E*, *F*, *G*, *H*, and so on. This division into groups has been, as I shall show presently, extensively used in the rules which regulate succession. But I am disposed to think that it had its original application not to rules of succession to individual property, but to rules of partition of family property amongst the members. There is one system of law, the Hindoo, in which the rules which govern the partition of such a family are well known to us, and it is worth while to state them shortly. In doing so I shall use the above pedigree.

782. When a Hindoo family breaks up and a division of the family property takes place, the first step is to divide the property into as many shares as there are groups of the first order; i. e. groups formed by the sons of *A*. Thus, if all the sons of *A* were alive, or represented, the division would be into *four* shares, one for each of the four groups. But if *E* and all his descendants were dead, then the division would be into *three* shares. If a further division were desired, as for example if *B* were dead, then the one-fourth which fell to the group *B* would be further divided into three, that is, the groups *F*,

Hindoo
law of par-
tition.

G, and *H* would each get one-twelfth of the whole. And so again, if *G* were dead, there might be again a division of this one-twelfth into two, giving one twenty-fourth to each of the groups *P* and *Q*.

783. This is the rule which governs a partition amongst persons forming a joint Hindoo family at the present day. The number of persons forming the group is disregarded. The distance of the individual from the common ancestor is disregarded. Thus, on a partition the individual *T*, if *L* and *D* were dead, would get as much as the whole group *B*.

784. It is useless to speculate as to the causes which led to this method of partition, which does not to our eyes appear very equitable. But I do not doubt that it has had a very extensive effect upon the rules of inheritance. The Hindoo law of inheritance coincides generally with the law which governs the partition of family property. If a Hindoo dies leaving property which is exclusively his own, the heir is sought amongst the male agnates of the family according to a rule very similar to that which regulates partition. The groups succeed each other, the nearest group taking first. Thus, if *P* were to die leaving separate property, his sons, *Y* and *X*, would succeed. If *P* had no sons the group *G* would succeed. If there were no representatives of the group *G*, the group *B* would succeed, and, failing this group also, the group *A*.

785. In one part of India, in the valley of the Lower Ganges, the rights of the descendants have been, as in ancient Rome, absorbed by the ancestor, so that on the death of *P* without sons, if *G* were alive, instead of the group *G* succeeding, *G* would take the whole. If *G* were dead and *Q* were alive, *Q* would take the whole. Here ownership has lost its corporate character.

Mahom-
medan
law of in-
heritance.

786. The classification of heirs into groups appears in a very striking manner in the Mahommedan law. When a Mahommedan dies, then, according to the express directions of the Koran, certain persons are to receive shares of the property. But these shares do not generally exhaust the

property, and the succession to the residue is governed by certain rules which are not to be found in the Koran, but which the Koran does not supersede. These rules obviously represent the old Arabian custom of succession. The persons who succeed to the residue, after the sharers are satisfied, are the male agnates, and with one modification the classes of male agnates succeed each other in the same order as in the Hindoo law. Only here, again, where the family system no longer prevails, the descendants are excluded by a living ancestor.

787. The same classification of the heirs into groups of persons descended from a single ancestor, and the use made of it in the determination of the heirs, was well known to the ancient German law, and it still survives in the Austrian Code. Germans call this classification of the heirs *parentelen-ordnung* or *lineal-ordnung*¹. The Austrians have, however, extended it to females and cognates, and the modern code of Austria traces the descent not to a single ancestor but to a single pair².

788. The conclusion to which these observations appear to lead is that the rules of intestate succession of an heir to the individual property of the deceased grew out of the rules which governed the rights of co-owners upon a partition of the family property. As the family system disappeared, the rights of the descendants have been absorbed by the living ancestor, and there have been many interpolations and alterations to obviate results which to modern eyes appear inequitable. Thus it may be said generally that the modern tendency is to give the inheritance to co-heirs per capita and not per stirpes: though I think there can be little doubt that the division per stirpes is the older rule and is connected with the division of the heirs into groups which I have been endeavouring to describe.

789. So far we have only dealt with the origin of the conception of intestate succession. But there exists also

Parente-
len-ord-
nung.

Testamen-
tary suc-
cession.

¹ See Holtzendorff's *Encyclopädie*, s. v. *Parentelen-Ordnung*; Unger, *Syst. d. Allgem. Oester. Priv.-Rechts*, vol. vi. p. 134.

² The Shiah Mahommedans have made a similar extension.

How far
founded
on fiction.

testamentary succession; that is to say, succession in which the person to succeed is determined by a declaration of the will of the deceased person. This, Savigny¹ says, rests upon a fiction; the fiction being that the deceased person continues to act beyond the period of his own death. If the testamentary power was really due to such a strange fiction as this, to which no physical conception ever corresponded, we could only wonder at it. By a metaphor it may be said that a man 'being dead yet speaketh'; but the words of a dead man can hardly create binding obligations. Nor do I know of any foundation for the statement that any such fiction was the origin of testamentary law². All the testamentary power in the world can be traced either to the Roman law or to distinct legislative enactment. But did the Roman law really know of any such fiction? The authority for a Roman will was itself to be found, either in the express assent of a body having legislative powers, or in the broad and sweeping maxim legislatively declared in the Twelve Tables that every man might dispose of his property as he liked³. The shifts and contrivances of Roman lawyers were, not to obtain the testamentary power, which they had got, but to get rid of the forms and restrictions which were imposed upon all alienations what-

¹ Syst. des heutigen Römischen Rechts, vol. i. p. 131, sect. 57.

² Perhaps it is in the following way that the fiction is traced to the Roman law. It is said by Modestinus (Digest, Book xxxi. sect. 36) that 'a legacy is a gift left by will'; this in the Institutes (Book ii. tit. 20, sect. 1) is changed into 'a legacy is a kind of gift left by a person deceased'; and this has been again transformed into 'a will is a gift by a person deceased.' It has been pointed out by Windscheid (Lehrbuch des Pandekten-Rechts, sect. 623, note 2) that the word 'gift' is not used in the passage of the Digest above quoted in its proper sense; and both the etymology and history of *legatum* indicate a totally different origin. See Smith's Dictionary of Antiquities, s. v. Moreover the history of the Roman law shows that the formalities necessary to a transaction of gift were got rid of, not by the fiction that one of the parties to the transaction was a dead man, but by special exemption of this particular transaction from the ordinary rules. See Savigny, Syst. d. hent. Röm. Rechts, vol. iv. pp. 21 and 424; vol. iii. p. 206.

³ *Uti legassit super pecuniâ tutelâre suae rei ita jûs esto*; Ulpiani Fragmenta, tit. 11, 14. See Maine's Ancient Law, first ed., pp. 201, 202.

soever, whether testamentary or *inter vivos*, and which in the case of testaments were felt to be peculiarly irksome. This was done by a variety of methods, none of which, however, as far as I am aware, depend upon the fiction of enforcing obedience to a dead man's commands. It may be that this expression figuratively describes what actually takes place under modern testamentary law: and there is also a vulgar notion that it is a sacred duty to yield implicit obedience to the wishes of the dead. It is further extremely probable that this notion, fostered, as no doubt it was, if not created, by the Church, in some measure accounts for the great latitude sometimes allowed to testamentary dispositions. But this is not the authority on which testamentary disposition rests: nor is it the origin from which it is historically derived.

790. It is not necessary for me to trace here the successive steps by which the Roman lawyers tardily arrived at the notion that a will in the modern sense of the term could be made: that is to say, that a man could dispose of his property to whom he pleased, and in whatever way he pleased, by means of intentions formed in his lifetime, but which remained until his death both secret and revocable¹. It is however remarkable that towards the end of the last century the true history of succession, both intestate and testamentary, seems to have been almost wholly forgotten and ignored. Blackstone², who was thoroughly acquainted with the ideas current in his day, speaks of succession as a contrivance which would naturally suggest itself at all times and in all countries to remedy the inconvenience which would occur, if (as he considers would otherwise be the case) the property of a deceased owner became vacant, and could be seized upon by the first comer: and he treats intestate succession as a supplementary contrivance in

Origin of succession incorrectly stated by Blackstone.

¹ The reader is referred for this information to Maine's *Ancient Law*, chaps. vi, vii.

² *Commentaries*, vol. ii. pp. 10, 12, 489. It is not easy to reconcile all that Blackstone says upon the subject.

order to meet particular cases of neglect or disability on the part of the deceased owner.

Effects of
this in
India.

791. This is, of course, mere idle speculation; but it was the current view when Blackstone's treatise was published. Nor has it been without important practical consequences. When we began to administer the law in India, we did in fact come in contact with a people amongst whom true wills were as yet unknown; but who, in spite of their usual strict adherence to their own laws, were by no means unwilling to acquire this important extension of the rights of the existing generation. It is very curious now to read the arguments by which the testamentary right was supported and opposed. All through the discussion testamentary dispositions of property are treated as if they stood exactly upon the same grounds as gifts of property *inter vivos*; and the whole discussion turns upon the question whether such alienations are allowed. The distinction between alienating property by gift during life, and disposing of it by a gift which operates after death, seems to have been wholly ignored. The constant assertion is, that wills must be looked upon as gifts made in contemplation of death: without any inquiry as to whether gifts made in the way in which wills are generally made were valid by the Hindoo law, even if the greatest latitude of alienation were allowed to living persons. This defective reasoning could have deceived no one who had considered it from the right point of view: and the real cause why it gained acceptance must have been the then inherent notion that wills were so natural an expedient that the recognition of them was almost a matter of course, when the right of alienation was established.

Distinction
between a
will and
gift *inter
vivos*.

Identity
of them
still some-
times in-
sisted on,

792. Many years later the validity of a Hindoo will was again questioned before the Privy Council. Wills had then been in use in India upwards of seventy years, and had been expressly recognised by the legislature¹. Notwithstanding this, it appears to have been thought necessary, perhaps in

¹ Regulation 5, of 1799, sections 1, 2.

order to disavow innovation, again to protest that a testamentary disposition did not differ in principle from an ordinary gift¹. A pretence was even made of testing the validity of the gift in that particular case, by the analogy of the actual law of gifts. To a gift it was said there must be a living donee—*ergo*, a gift to a person unborn is invalid. Surely with equal force it might have been said, to a gift there must be ^{but} a living donor—*ergo*, a gift by a dead man is void. If, again, ^{wrongly} as is there said, the law of wills is simply a development of the law of gifts, by carrying on the gift up to death, why is it that the *donatio mortis causâ* has been developed as a distinct transaction? and how have the formalities which are necessary to this form of donation come to be dispensed with in wills? The whole law as to *donationes mortis causâ* is based upon the supposition that, generally, a mere one-sided declaration of intention by the owner of property, upon which nothing is done, effects nothing. The *donatio mortis causâ* ^{and disadvantageously} would be an impossible halting-place if the law of wills had been a development of the law of gifts, in the sense that one may be inferred logically from the other.

793. Nor do I see how, if wills are to be conceived as gifts by the deceased not made in his lifetime, they can be defended against the imputation of absurdity. They can always then be attacked as Mirabeau attacked them. ‘There is as much

¹ See the case reported in the Bengal Law Reports, vol. ix. p. 377. The passages to which I refer are at pages 397, 398. The Privy Council there describes a will as ‘a disposition of property to take effect upon the death of the donor’; and say that such a disposition ‘though revocable in his lifetime is, until revocation, a continuous act of gift up to the moment of death and does then operate.’ If I understand the reasoning rightly it is meant, not only that the act should be continuous until death, but that it must be continued until at least one moment *after* death; and so Savigny evidently thought; *supra*, sect. 784. If this be not so, then a will is still a transaction *inter vivos*, and the difficulty about getting rid of the rules which regulate such transactions is not avoided. Of course making a will to be a gift by a deceased man was not necessary to the view the Privy Council were seeking to establish as to the limitations upon the testamentary power. In fact those limitations come out all the stronger the more we look at a will as a special transaction standing by itself.

difference,' he said, 'between what a man does during his life and what he does after death as between death and life. What is a testament? It is the expression of the will of a man who has no longer any will, respecting property which is no longer his property: it is the action of a man no longer accountable for his actions to mankind; it is an absurdity, and an absurdity ought not to have the force of law¹.' From the point of view taken these observations are unanswerable. The testamentary power carefully guarded and restrained may not be an absurdity; but it would be so if it were, as Mirabeau views it, and as Savigny and some English lawyers have represented it, nothing more than a dead man's expression of desire. The real answer to all such objections is that, politically, the power of testamentary disposition rests, like every other institution of law, on habit and convenience, backed by authority; historically, it has grown, like other law, partly out of the expressly declared will of the supreme power, partly out of judicial decision, and partly out of custom.

Succession
in Eng-
land.

794. Having now given some idea of the methods by which the problem of succession was originally solved, I proceed to consider the legal conceptions which it at present involves: and I will first deal with the succession to moveables.

Obscurity
of history
of English
law.

795. It is not necessary to attempt here a complete history of the English law of succession to moveables. That history is involved in considerable obscurity, and is, in fact, the history of a very long and very severe contest. In this contest the Church took a very active part, and succeeded at one time in obtaining, together with some pecuniary advantage, consider-

¹ Bulwer's *Historical Characters*, vol. i. p. 114. Mirabeau was probably thinking of Leibnitz, who had said, '*Testamenta vero mero jure nullius essent momenti nisi anima esset immortalis, sed quia mortui revera adhuc vivunt, ideo manent domini rerum, quos vero heredes reliquerunt, concipiendi sunt ut procuratores in rem suam.*' Leibnitz, *Nova Methodus Jurisprudentiæ, Pars specialis*, sect. 29; vol. iv. part iii. p. 187, Geneva ed. 1768. It is curious to see how readily people sometimes set aside what they are pleased to call '*merum jus*,' and the shifts they are put to to supply its place.

able influence over the law applicable to succession, as well as some share in its administration. Hence the English law of succession in the case of moveables has been in a great measure based upon the Roman law, to which the Church generally adhered. And though the principles of this law have been freely modified by the temporal courts, which have long since re-established their exclusive jurisdiction in all points of real importance, it still remains the best way of considering the English law of succession to moveables to treat it as an offshoot of the Roman law.

796. One of the salient principles of the Roman law of succession (as will be readily understood after the observations I have made upon its origin) was, that the succession dealt with was a universal one. What passed directly from the deceased to his heir or heirs was the whole aggregate of his rights and obligations. Every heir took either the whole or a share of that aggregate—a half, a third, a fourth, as the case might be: and it was an absolute rule of Roman law that this devolution should be complete, immediate, and unconditional. No device could get rid of this rule, and every scheme for securing to particular individuals particular portions of the property, or for carrying out particular wishes of the deceased, had to be framed with strict caution not to violate this principle. Thus a legacy could not be given direct to the legatee, but the thing bequeathed went to the heir, from whom the legatee could claim it. So if a man desired that any portion of his property should be held and enjoyed in a special manner, he could not separate that portion from the common stock, but could only lay his heir under the obligation to carry out his wishes.

797. This view is partly adhered to in the English law. On the death of a person the whole of his moveable property passes *en bloc* to his executors if he die testate, to the ordinary if he die intestate; and the same persons are liable for the debts of the deceased. Indeed, under the English law, the principle has in one respect been somewhat unreasonably

Succession
under Ro-
man law
universal.

Partly so
with us in
the case of
move-
ables.

extended ; I ought perhaps to say, distorted. Even the blood relations of an intestate, or the universal legatee of a testate, do not, under the English law, take his property directly, but only indirectly through the executor or administrator. This can only have been because the Church thrust itself between the deceased person and his successors, and insisted upon treating the administration of the estate as in all cases dependent upon its own authority, exercised through the administrator or executor, as the case might be. Of course for this there was no authority in Roman law.

No partition
allowed.

798. Under the English law there cannot even be a partition of the inheritance : the representatives, if there be several, cannot be made owners of shares, but must be together one single owner of the whole : whereas, under the Roman law, if there were several heirs, each was owner of his own share. There is a good reason why in this respect the Roman law has not been followed. A separation of the inheritance must lead to difficulties about the administration of the estate, and we find that in countries which have adopted the Roman law, the testamentary heirs are frequently placed under the control of a single person.

No privity
between
deceased
and heir
or legatee
of move-
ables.

799. It follows, of course, from what has been now said, that between the heir, or the legatee, and the deceased there is, under the English law, in the case of moveables, no privity whatsoever. At the death, neither the heir¹ nor the legatee has a right to claim any portion of the moveable estate ; they are not liable for anything ; they do not in any way *succeed* to the deceased. The whole of their right consists in this—to call upon those who are administering the estate to proceed according to law. The nearest approach to an exception to this principle is in the case of the legacy of a specific thing ;

¹ I use the word 'heir' to designate the person who is entitled beneficially to the moveable property of an intestate. As pointed out *infra* (sect. 805), there is in England, properly speaking, no hereditary succession to moveable estate, but I am obliged to find some designation for the person who really gets the benefit of it.

if the executor appointed by the will have assented to a legacy of this description, the thing belongs at once to the legatee. In all other cases the only remedy is by an action for the administration of the estate.

800. It was an immediate deduction from the Roman idea of succession that the heirs, whether of a testate or of an intestate person, were liable to pay all the debts and fulfil all the obligations of the deceased whom they represented. The succession being a universal one, there was no distinction between the assertion of a claim and the submission to a liability. Consequently, under the Roman law an heir might find himself in a very serious position; that he had more to pay than to receive; that the claims on the estate were greater than the assets. Upon this ground he was allowed a reasonable time to reflect and decide, whether or no he would accept the inheritance. Having once done so, he was personally bound by every obligation of the deceased which was not by its nature incapable of being transferred from one person to another. This led to great inconvenience; first, on account of the delay which took place whilst inquiries were being made, and secondly, on account of the frequency with which inheritances of doubtful solvency were refused by the heirs. In order to avoid this inconvenience, what has been known as the ‘benefit of the inventory’ was introduced by a constitution of Justinian¹. The provision was that, if in compliance with certain forms, and within a certain time, a complete inventory of the property of the deceased was made and filed in the proper office by the heir, and this property was kept entirely separate from the property of the heir himself, then the heir could claim exemption from liability for any claims of the deceased which the assets were insufficient to satisfy. The heir, however, had to give notice before he entered upon the property that he intended to claim this exemption; and he forfeited his protection, if he did not deal with the property honestly for the benefit of all parties concerned. This is, in

Liability
of heirs
to debts
under the
Roman
law.

Benefit of
the inven-
tory.

¹ Cod. Just. Book vi. tit. 30, sect. 22.

substance, the general law at the present day throughout the continent of Europe.

Liability
of executor
and ad-
ministra-
tor for
debts.

801. In England the liability to the debts of the deceased person has got somewhat displaced from its natural coincidence with the reception of the assets of the estate. The legatees and next of kin having no direct connection with the deceased, and not being his representatives, have nothing to do with his debts, the liability to which falls entirely on the intermediate functionary, the executor or administrator. Nor is the position of either of these identical with that of the Roman heir, although our law is clearly traceable to a Roman source¹. It seems that originally an inventory was required from the executor or administrator in every case before he was put in possession of the property; and it was considered a matter of course that he got the 'benefit of the inventory,' without the necessity of his putting in any special claim to it. But gradually the practice of putting in an inventory fell into disuse, or dwindled into a mere form; whereas the benefit which had originally been conditional upon the faithful performance of this duty was nevertheless retained². So that without furnishing any inventory at all, executors and administrators are now exempt from all personal liability except for the due administration of the estate: and they only become personally liable if they violate or neglect their duty, and are guilty of what is called a *devastavit*, or 'wasting the assets,' in which case they must answer out of their own pocket; not however even then for the whole claim, but for what they had, or might have had, of the property of the deceased³.

¹ Williams on Executors, sixth ed., p. 912; compare Erskine's Institutes of the Laws of Scotland, Book iii. tit. 9, sect. 41.

² There has however always been a tendency, and it is just now perhaps a growing one, to treat the 'estate' itself as liable to the debts; making the estate a sort of juristical person; and it would not be difficult to bring our law into this view. Recently where a testator died having an interest in an uncompleted contract, Sir William James spoke of his estate as being 'a co-contractor' in the business. Law Reports, Chancery Appeals, vol. ix. p. 343.

³ Williams on Executors, sixth ed., p. 658.

802. Another essential principle of the Roman law, likewise dependent upon the idea of personal succession, was, that there was no interval or breach at the death of the deceased, but the heirs at once stepped into his shoes. It was the same idea as is expressed in our maxim that 'the king never dies.' On the other hand, however, the consent of the heir was necessary to the vesting of the inheritance: until the inheritance had been accepted it did not belong to the heir. There was, therefore, a conflict between the theory and the fact: there was a space of time, very often a considerable one, during which, whatever the theory might be, the inheritance did in fact belong to no one. This difficulty was partly got over by the doctrine of 'relation back,' as it is called: that is to say, the heir, though he was not really heir before he accepted, yet, when he accepted, was treated exactly as if he had succeeded immediately on the death of the owner. Still the difficulty remained, that in the interval the inheritance was vacant, which might give rise to practical inconveniences which no fiction could remedy. The common method of meeting this difficulty was by the appointment of a person for the intermediate custody and management of the property¹.

Under Roman law consent of heir necessary to succession;

but his title related back.

803. The state of the English law upon this matter is somewhat peculiar. We frequently find it laid down positively, that an executor derives his title directly from the will; that the property vests in him from the moment of the testator's death; and that the probate is only evidence of title, and not the title itself. That to some extent, however, this statement is not the assertion of an actual fact, but of a legal fiction, is evident, I think, from the following considerations:—It is perfectly true that an executor derives his title directly from the will in this sense, that the inheritance passes immediately to the executor from the testator, and not, as in the case of an

Acceptance by executor also necessary.

¹ See an interesting discussion of the maxim 'le mort saisit le vif,' by which continental nations have bridged over the interval between the deceased and his heir, in Lassalle's *Syst. des Erworbenen Rechts*, vol. ii. part 2.

administrator or a legatee, through another person. It is also true that the only use of probate is to satisfy a rule of evidence, and that the grant of probate confers no right whatever. But still the property does not, in fact, vest in the executor at the moment of death. As under the Roman law, it does not vest until some act has been done, which is equivalent to an acceptance of the inheritance, and the commonest mode of acceptance is the application for probate, though any intermeddling with the estate is sufficient for that purpose.

His title
also relates
back.

804. If this were not the correct view of the position of an executor, another position taken by English lawyers would be wholly unintelligible. The same authors who tell us that the inheritance vests in the executor at the moment of death, speak of the relation back of the title of the executor from probate to the death of the testator¹. The only possible explanation which I can conceive of this language is, that when the executor, by applying for probate, unequivocally accepts the inheritance, the inheritance is then assumed to have vested in him at the death of the testator. If it had already really vested in him, then there could be no relation back at all. So also the distinction that, if the first executor die after proving the will, the inheritance passes on to his executor, but if he die without having proved the will, it passes to the ordinary who must grant administration, seems to me only capable of explanation upon the assumption, that the inheritance had never vested in the executor who had not expressed his assent by applying for probate. It may be that this assumption was not always quite correct, as Lord Holt pointed out²; but the only error would be one of fact, in disregarding all other acceptance than that by application for probate. The principle of law upon which the ordinary acted in granting administration, namely, that the inheritance had never vested in the executor who had not accepted, was

¹ Broom's Commentaries, first ed., p. 616. See also the language of Lord Denman, Adolphus and Ellis' Reports, vol. x. p. 212.

² Salkeld's Reports, vol. i. p. 308; Williams on Executors, pp. 245, 282.

correct, and has always been acknowledged. It is also upon the same principle that if an executor renounce, and administration be granted, no assent or assignment by the renouncing executor is necessary.

805. The relationship between the deceased person and his executor is wholly different from that between the deceased person and his administrator. The executor is the heir of the deceased; the inheritance passes to him directly; and he represents the deceased. Strange as it may seem, yet it is true that, in contemplation of our law, a person who dies intestate has (strictly speaking) no heirs of his moveable property. Down to the year 1857 his property passed to an ecclesiastical functionary called the ordinary: now it passes to the Judge of the Court of Probate¹. There is no necessity to enter here into the inquiry how the very peculiar view came to be taken, that the property of persons dying intestate vested in the ordinary; especially in a country not always prone to submit to ecclesiastical authority. It no doubt had its advantages. In all probability, no other person would have shown any respect whatever for the rights of others, which the ordinaries always did to some extent; though it was not without considerable resistance that what we should call the obvious rights of the kindred of the deceased and of claimants upon the estate were fully recognised.

No heir to moveable property of intestate.

It passes to the ordinary.

806. The English law has, however, been brought round to a reasonable condition, not by altogether expunging the idea that an intestate person leaves no heirs, but by controlling the ordinary. The 13 Edward I, statute 1, c. 19, directed the ordinary to pay the debts of the deceased, which plain duty it appears that the Church was disposed to neglect. But the most important changes were introduced by the 31 Edward III, statute 1, c. 11. Prior to that statute it had been customary for the ordinary to appoint an officer of his own to administer the property of the deceased. The person so appointed was a mere agent of the ordinary, subject to

Ordinary, how controlled.

¹ 21 & 22 Vict. chap. xcv. sect. 19.

the usual rules of agency ; and of course possessing only such powers as the ordinary chose to give him. The statute of Edward III, however, contained three very important provisions : (1) it compelled the ordinary to depute, not any person he chose, but the nearest of kin to administer the estate ; (2) it gave to the persons so deputed the same right as the executors have to sue in their own names to recover debts due to the deceased, which right, strange to say, the ordinary never had ; (3) it made the persons so deputed liable to be sued in their own names for the debts of the deceased.

Property
now vests
in the
adminis-
trator.

807. This statute was also interpreted to imply, though it is not expressly so said, that the property of the deceased became vested in the administrator in the same way as in the executor ; and it would have been also a legitimate inference, as well as one which would greatly have simplified the law, if, having so far assimilated the position of an executor to that of an administrator, it had been further held that the administrator, like the executor, directly represented the deceased, and that his title commenced from the moment of the intestate person's death. This, however, was not done.

But he is
still called
the agent
of the
ordinary.

The administrator was still looked upon as only an ' officer of the ordinary', though in what sense he could still be so called it is difficult to say : for the ordinary had no control, or next to none, over his appointment ; and he held rights which the ordinary was unable to confer. Nevertheless, the doctrine is still adhered to that administrators derive their title solely from the grant of the administration to them by the ordinary : although, to remedy glaring injustice, administrators are sometimes dealt with in special cases *as if* their title also related back to the death of the deceased.

Adminis-
trator ori-

808. The result of the statute of Edward III being to

¹ Blackstone's Commentaries, vol. ii. p. 496 ; Williams on Executors, sixth ed., p. 388. The view is absolutely erroneous. If he were only an agent, how could he be the owner of the property ?

give the inheritance entirely to the administrator, and no liabilities being imposed upon him except to pay the debts of the deceased, the right to the grant of administration in a solvent estate was one of very great value: for the person who, as next of kin, was entitled to the administration under the statute took for his own benefit the whole of the surplus proceeds of the estate¹. This was certainly an unsatisfactory result. Prior to the statute, when the estate was administered by the Church, the widow and children had always in practice, if not by absolute right, got each their *pars rationabilis*, a half or a third according to circumstances². Now all went to a single relative, and others for whom it was a duty to provide would thus frequently be left penniless. The Church, which had always fought strenuously for the rights of the widow and children, and had succeeded in establishing their rights to some extent, naturally enough made an attempt to prevent this disastrous result of the statute. The ordinaries began to take bonds from administrators as to how they would administer the estate, by which bonds a provision for the widow and the children was secured. This, however, the Courts of Common Law prohibited as a usurpation, as it probably was³.

ginally
took the
surplus
himself.

Origin of
adminis-
tration of
bonds

809. But at length the Statute of Distributions⁴ sanctioned the practice, and even made it compulsory on the ordinary, in every case, to take a bond from the administrator to exhibit an account to the ordinary showing the surplus (if any) after the assets were collected and debts paid; which surplus the ordinary was directed to distribute amongst the next of kin, according to the rules therein laid down.

Statute of
Distribu-
tions.

810. Considering the pretensions which the Church had successfully put forward, and the language of the various

Weakness
of the Ec-
clesiastical
Courts.

¹ Williams on Executors, sixth ed., p. 1372.

² Williams on Executors, sixth ed., p. 387; Maine, Ancient Law, first ed., p. 244.

³ Williams on Executors, sixth ed., p. 1372; Blackstone's Commentaries, vol. ii. p. 515.

⁴ 22 & 23 Charles II, chap. x.

statutes in which those pretensions, whilst they were modified, were still recognised to a considerable extent, it would seem to have been almost inevitable that all matters connected with the administration of the moveable property of deceased persons, both testamentary and intestate, would have fallen into the hands of the Ecclesiastical Court. But this has not been the case. The Court of Queen's Bench has always prohibited the Ecclesiastical Courts, whenever any attempt was made by the latter to exercise functions which it thought it was better able to exercise itself: and even without these prohibitions there was always the fatal defect in the procedure of the Ecclesiastical Courts, that they had no process by which to enforce their judgments¹. They had possessed such a process, and a very formidable one it was at one time, being nothing less than excommunication. They possess in name the power of excommunication still; but it is a threat, and a threat only; and as a threat it has lost nearly all its terrors. It is true, as Blackstone says, that to prevent these courts falling completely into contempt the common law lent a supporting hand to their otherwise tottering authority. It would, however, be perhaps more correct to say that they were handed over to the tender mercies of a jealous rival, who only assisted them at the price of their complete submission.

Succession
to im-
moveable
property,

811. I now pass to the consideration of the law of succession to immoveable property, and we find the change of ideas to be very great indeed.

entirely
distinct
from suc-
cession to
moveable.

812. The law of England has not only drawn the distinction between moveable and immoveable property differently from other countries in Europe, but it has made that distinction wider. In no other country do we find two perfectly distinct bodies of law governing the succession to the two different sorts of property. This is, however, the case in England. In considering the law of succession to immoveable property we must begin entirely *de novo*; not a word that is said about

¹ Blackstone's Commentaries, vol. iii. pp. 101, 102.

the succession to moveable property is applicable to immoveable property, and *vice versâ*. The whole conception is different from beginning to end.

813. Moreover, whilst we are far from being able to trace the law of succession in the case of moveables with clearness and continuity, in the case of immoveables its history is buried in the deepest obscurity. A few isolated conclusions are all that have been arrived at by enquirers. 'The primitive German or allodial property,' says Sir Henry Maine, 'is strictly reserved to the kindred; not only is it incapable of being disposed of by testament but it is scarcely capable of being alienated by conveyance *inter vivos*¹.' All property, however, even all landed property, was not allodial; and to property not allodial the same strictness does not extend; and there are also indications that the rules applicable to non-allodial land were gradually extended to all lands. These rules were the result of successive importations from the Roman law which, combined with certain barbarian ideas, formed the feudal system². Out of this emerged the law of landed property, the actual state of which in England at any one time cannot be described for any period earlier than the time of Henry II. At about that time it may be said to have become settled law, that all land descended to the eldest son; and to the son of the eldest son, if the eldest son died in the lifetime of his father; that in default of direct descendants collaterals came in, and their representatives; that during his lifetime the owner might dispose in some cases of his purchased lands, and of a portion (not the whole) of those which came to him by descent; but that he had no power to dispose of lands by will³.

Testamen-
tary dis-
positions
of land
formerly
not
allowed.

¹ Ancient Law, first ed., p. 198. Bluhme (Encyclopädie, sect. 513) quotes this curious old German rhyme:—

‘Wer seelig will sterben,
Schall laten vererben
Syn allodi Gut
Ant’ nächst gesippt Blut.’

² Maine's Ancient Law, first ed., p. 296.

³ Reeves' History of the English Law, chap. ii.

Introduc-
tion of use.

814. Testamentary dispositions of landed property, like so many other considerable alterations in our law, were introduced by the invention of uses. I do not propose here to trace the history of that invention further than to point out that its origin is not (as has been supposed) to be found in the Roman law, either in the *fideicommissum*, or, as the name might seem to indicate, in the *usus*. I have elsewhere¹ shown what the Roman *usus* really was, and that it had nothing to do with equity. The *fideicommissum* was, it is true, in a certain sense an equitable obligation, but it did not produce what English lawyers call a use, or trust estate. The person upon whom the fiduciary relation was imposed was not bound, like an English trustee, to hold the thing for the use or benefit of another; on the contrary, he was bound to hand over the thing itself; from which time he lost all control over it, and it belonged absolutely to the person for whose benefit it was originally intended. In all systems of law fiduciary relations are well known and understood; other systems of law also exhibit the peculiarity of a special set of rules applicable to such relations. But the relation of trustee and *cestuique trust* as understood in the English Courts of Chancery is unknown in any other system in the world, except where we have introduced it, namely, in America, in the English Colonies, and perhaps in India.

Devise of
the use.

815. However, anomalous as it was, the use, as an equitable right distinct from the land, was successfully established; and moreover it was assumed, though, as far as I can see, there is nothing to warrant the assumption, that this was an interest with which only the Court of Chancery, and not the Courts of Common Law, could deal; and further, that in dealing with it the Courts of Chancery were not bound by the ordinary rules relating to landed property. Of course this easily led to the contrivance by which the right of testamentary disposition over land was substantially exercised. The land was conveyed to what was called a feoffee to uses;

¹ *Supra*, sect. 305, 393.

who at common law was the absolute owner. The uses were then declared in a will, and the Court of Chancery compelled the feoffee to carry out the intention. The statute of Henry VII, though unsuccessful as an attempt to put an end to uses, was considered to have put a stop to this mode of disposition; but almost immediately afterwards an express enactment conferred an absolute right of alienation, both testamentary and *inter vivos*, upon all owners of land, with exceptions which have since become insignificant.

816. This being the origin of wills of immoveable property, and the statute¹ which created them so treating them, they were very naturally looked upon only as one form of alienation; and in fact such wills have generally been considered in the English law merely as a species of conveyance; differing from an ordinary conveyance only in the solemnities which accompany their execution, and in some minor rules of construction which the nature of the transaction suggests. It must not be supposed, however, that there is here any fiction about carrying out the wishes of a dead man. The statute has provided that a gift, secret, revocable, conditional, and unaccompanied by any of the forms necessary to a transfer *inter vivos*, shall be valid: and this, though contrary to general principles, of course the legislature was perfectly competent to do².

817. In the case of land the degrees of consanguinity are calculated not according to the rules of the Roman, or

Devise of land treated as a species of conveyance.

Intestate succession to land.

¹ 32 Henry VIII, chap. i.

² I have no doubt, however, that many persons still find any fiction acceptable which will disguise the arbitrary origin of rights of succession: I suppose because legislation on this subject appears to trench upon the sacred principle of non-interference with rights over property. I do not imagine that eminent lawyers would be seriously embarrassed by such scruples, but they sometimes feign a respect for them in argument, as in the case mentioned above (*supra*, sect. 557). And quite recently a very learned Judge delivering judgment in the House of Lords, supported his conclusions by the very curious suggestion that the Statute of Distributions was nothing more than the making of a will by the legislature for the intestate. Law Reports, Eng. and Ir., App., vol. vii. p. 66.

as it is usually called, the Civil Law, as it is, in succession to moveables, but according to the rules of the Canon Law¹; of which peculiarity I have never yet seen any explanation. The difference between the two modes of computation is that whilst the Roman or Civil Law counts the number of degrees in both lines from the deceased person through the common ancestor to the heir, the Canon Law counts the degrees in one line only from the common ancestor to the deceased, or to the heir, whichever is furthest off. For instance, my first cousin is related to me in the fourth degree under the Roman or Civil Law, but in the second degree under the Canon Law. The other two peculiarities, namely the entire exclusion of the ascending line and of the brothers of the half-blood, have both been removed by statute². The difference in the mode of calculating the degrees however still remains.

Liability
of heirs of
land to
debts of
ancestor,

818. Nothing marks more clearly the wide difference between the ideas of succession as applied to moveables and as applied to immoveables than the difference in the law as to the liability of heirs for the debts of the deceased. The strict notions of personal representation and continuance which are involved in the conception of succession carried this liability to the very utmost, making the heir in some cases even personally liable for the debts of the deceased. This, as we know, our own law has modified when applying the conception of succession to moveable estate, and the modification is just and reasonable. This conception of succession and strict personal representation has never been applied by us at all to immoveable property. Still it is difficult to account for the views which English lawyers at one time seem to have entertained as to the entire freedom from liability of those who have inherited land. It has indeed been said that in very ancient times the heir of land was liable for the unpaid debts of his ancestor, and that the narrower rule which we find laid down by Britton in

¹ Blackstone, Commentaries, vol. ii. p. 206.

² 3 & 4 William IV, chap 106.

the time of Edward I, that the heir of land was liable if the deceased had specially bound him by the deed under which the debt was due, was a restriction due to feudalism¹. This seems, however, to be mere conjecture, and no feudal reason can be assigned for the exception made in favour of debtors, when the heir was specially bound. It must be remembered, moreover, that in the period which immediately preceded the reign of Edward I, lands were not available even to the creditors of a living man at all; and I should rather be disposed to consider the rule laid down by Britton as a construction of the statute of Edward I² in favour of creditors, than as a restriction on their rights.

819. Consistently with the idea that a devise by will under the statute was an alienation of the land, it was held that the creditors of the testator had no claim against the devisee.^{and of devisee.}

820. Gradually, though very slowly, the principle has been established by express legislative provision that the heir is liable for the debts of the deceased, whether he takes under a will or by intestacy.

¹ Williams on Real Property, seventh ed., p. 74.

² 13 Edward I, stat. 1, chap. xix.

CHAPTER XIX.

SANCTIONS AND REMEDIES.

Relation
between
sanctions
and rights.

821. I HAVE hitherto considered law, and the duties, obligations, and liability which arise out of law, only from one point of view—as the machinery by which a political society is governed. It is true that I have adverted to the division of duties into those which are absolute and those which are relative; and I have spoken of the right which corresponds to the relative duty: but I was desirous not to complicate further a discussion already sufficiently complex by remarking then upon another distinct order of ideas which these terms connote.

Laws are
not made
for the
benefit
of indi-
viduals
but of
society at
large.

822. As a general principle the point of view above taken is the only true one in this sense—namely, that it is the only one which justifies the existence of laws at all. No one creates or enforces duties nowadays for the benefit of individuals, or classes of individuals, but for the benefit of the community at large. If any modern law has the aspect of conferring new advantages on one class of society alone, we may be sure that it has been adopted only on account of the indirect advantages which it is alleged will be derived from it by the remainder.

This is not
histori-
cally true.

823. Of course when I assert this, I do not mean to say that a conviction of their utility was the original moving cause of the introduction of all, or even of any very large

proportion of existing laws; for many of them came into existence long before any such ideas as those to which I now advert were started in the countries where they now prevail. Nor do I doubt that there are everywhere to be found persons who, in their own minds, are persuaded that they have an hereditary and indefeasible right to certain privileges, an interference with which on considerations of utility would be immoral and absurd. But no one avows this; and we need only look to the debates of legislative bodies, or to the published declarations of the rulers in every state, to see that the only principle on which they pretend to govern, the only ground on which they expect that their subjects will consent to obey—in other words, the only means by which a political society can in modern times be kept together—is that the object of government should be, or at least should profess to be, the happiness and prosperity of the people at large.

824. In this respect there is no distinction between those duties which are relative and those which are absolute. The law of ownership, for example, which comprises a great variety of relative duties, is supposed to exist as completely for the benefit of society at large, as the law of treason, or the bribery laws. The law of ownership is said to encourage industry and commerce, to promote an increase in the production of the necessities and luxuries of life and in their distribution, and so forth. If it could be shown not to possess these advantages it would gradually disappear, or be modified. Nobody really doubts this, or denies it; only whilst some men are prone from time to time to renew the test of utility, and to try this as well as other institutions by this standard with great care, other men are, or profess to be, so convinced of its excellence, that they are impatient of any inquiry about the matter.

It is true now of all laws, whether they create absolute or relative duties.

825. It may possibly be suggested that this is hardly in accordance with what we see around us, or that it is at any rate too widely stated. For while it is true that some breaches of the law of ownership are considered as offences against society at large, others evidently are not so. For instance, if

Apparent contradiction to this in matters of civil procedure.

a man steals or mischievously destroys my property, he may be prosecuted and punished in the Queen's name at the public expense; but if a man injures my property by negligence, no one dreams of treating this as a matter of public concern; I am left to proceed against him or not as I like; and if I do proceed against him, it is not to punish him, but to recover compensation for the injury which I have sustained. I must take the whole trouble and risk of this upon myself, and if I am satisfied, there is an end of the matter.

826. There is, no doubt, this apparent inconsistency between the proceedings of courts of civil and courts of criminal jurisdiction. Whilst in criminal courts we see plainly before us the breach of law followed by its appropriate *punishment*, which deters others from breaking the law by warning them that they too will incur the like consequences—which, in other words, operates as a sanction; in civil courts we find that the only thing thought of is *redress*, and there is apparently nothing which is intended to operate as a sanction at all.

How this
apparent
contradiction
may
be re-
moved.

827. I do not think however it will be difficult, without going minutely into an historical inquiry as to the origin of legal tribunals, to discover whence this apparent divergence between the functions of civil and criminal courts arose; and hence to infer that it is only apparent, and that the real functions of all courts are the same—namely, the enforcement of obedience to the commands of the sovereign authority.

Retalia-
tion.

828. Prior to any distinction between criminal and civil procedure, prior even to legal procedure of any kind, there seems to have arisen everywhere the notion of retaliation; that is, of inflicting an evil upon the wrong-doer exactly in proportion to the wrong he has inflicted upon you. 'Breach for breach; eye for eye; tooth for tooth,' says the Mosaic Law¹. '*Si quis membrum rupit aut os fregit talione proximus cognatus ulciscatur*,' says the Law of the Twelve Tables². And

¹ See Leviticus xxiv. 20.

² See the article *Talio* in Smith's Dict. of Greek and Roman Antiquities.

the earliest customs of all Teutonic nations were based on similar principles. This is obviously punishment, and not redress; it is the direct application of a sanction; and would operate precisely in the manner which Austin considers a sanction to operate in enforcing an obligation in modern jurisprudence¹.

829. Retaliation, however, though it is punishment and not redress, was undoubtedly looked upon as some *satisfaction* to the party injured, and this may very likely have suggested, when a fixed money payment was substituted for the *talio*, or equivalent injury inflicted on the wrong-doer, that the money should be paid to the sufferer. This obviously answered all the purposes of a sanction, loss of money being an evil which persons are generally anxious to avoid; nor any the less so because it is paid to a particular person, and not, as money payments used directly as sanctions now generally are, into the public treasury.

830. There is still a considerable step, no doubt, from this to our modern ideas of compensation. Thus, under the laws of Alfred, for the loss of a forefinger the compensation was fixed at fifteen shillings in all cases. In a suit brought against a railway company for a similar injury, it would vary in every case according to the pecuniary loss which the sufferer might be supposed to have incurred in consequence. And there is no doubt the ideas of compensation have made a prodigious advance, even within the last few years²; but still no one,

Substitution for it of a money payment.

Modern ideas of compensation.

¹ See *supra*, section 192.

² See the general view of the subject of damages in the treatise on that subject by Mr. Sedgwick, where the authorities are collected with much industry and research. The earliest declaration of the rule, that the damages are to be measured by the injury sustained, is quoted from Lord Holt (see p. 29). But I think the notion of calculating the compensation for a personal injury upon an estimate of what money the sufferer, but for the injury, might have earned, is of still later origin. It may possibly be doubted whether these notions about compensation will be very long lived. The cases in which damages are most liberally awarded are those where the defendant is a large public company. But a company has it in its power to exclude its liability in almost all cases by express stipulation, or, by raising its prices, to cast back the burden, in a great measure, upon

I think, would doubt that they have grown gradually out of the 'were' and 'bot' of the Anglo-Saxon Law, just as the 'were' or 'bot' itself grew out of the 'fend' ¹.

Specific
enforce-
ment of
duties and
obliga-
tions.

831. But there is another point of view in which it is necessary to consider the action of legal tribunals in enforcing the law, which will be best brought out by an illustration. If a wound be inflicted, or valuable property be damaged, a great, possibly an irreparable injury has been inflicted, but all that the law can do in such cases is to inflict punishment by way of example, and to compel such redress as is possible in the shape of compensation. But if I wrongfully keep my neighbour out of possession of his property, then the law can do much more than merely compel me to make compensation. It can actually restore my neighbour to the enjoyment of his right. Here again, however, redress and punishment go hand in hand. The law is put in motion to take the property by force from the wrong-doer and restore it to the owner, and at the same time he is directed to pay a sum of money for the damage caused by the temporary loss of possession, and for the costs of the proceedings.

832. From the habit of obedience to the law which generally prevails amongst men, a resort to such extreme measures as have been just described is rarely necessary, nevertheless it is this which is contemplated under our law as the ultimate result, in all cases where the injury in question is the wrongful detention of land. Forceful transfer of the possession of things other than land has not been generally thought necessary under

the general body of its customers. At present the doctrine seems to affect even international relations. The Americans claimed 2,000,000*l.* sterling, on account of damages sustained by reason of our alleged breach of neutrality. The Germans have obtained compensation on an equally large scale for what they assume to be a wrong done to themselves by the French nation in declaring war. Claims not less extensive have been made before, by the strong hand; but I think that it is new to place such claims on a quasi-legal ground.

¹ See Kemble's *Anglo-Saxons*, book i. chap. x., and the *Laws of Alfred*, 43. 44. 'Bot' is the name given to the compensation ordered to be paid in case of a wound; which when life was taken was called 'were.' The right of private warfare to revenge an injury was called 'feud.'

our law, even where such transfer is possible ; but this is only upon the assumption that the limit of the injury is, except in very rare cases, the present money value of the article detained, and that it may therefore be covered by compensation¹. But even if this assumption be true, it must be remembered that an order to pay compensation is no redress, if the person ordered to pay be insolvent.

833. Duties, the performance of which is thus secured, are said to be specifically enforced ; and there are many others which may be so dealt with besides those of the class above mentioned. Where there is a dispute about the title to specific things, whether land or moveables, which are at the moment in the possession of neither party, but of a third person holding as the representative of, or derivatively from, the true owner, the right of the true owner may often be specifically enforced by declaring it, and requiring this third person (who generally, not being interested in the dispute, will be ready to obey) to acknowledge the right of ownership as declared². So also a very large number of duties either are primarily to pay money, or are such that a breach of them results in a duty to pay money ; and all such duties are in their nature capable of being specifically enforced, by the property of the debtor, if he has any, being seized and sold, and the proceeds being handed over to the creditor ; which is invariably done should the debtor delay or refuse to pay the money, after he has been ordered by a court of law to do so. So again, through the power which every court has over duties of every kind, rights may be transferred from one person to another ; and where the duty which it is desired to enforce is to make this transfer, this can be done, whether the party obliged to make it consents or no,

Specific
perform-
ance.

¹ See *supra*, sect. 512.

² It is sometimes said that, when an officer of a court executes a conveyance in the name of another person who has been ordered to convey, but who refuses to do so, the obligation to convey is thereby specifically enforced. But this, I think, is hardly correct. The order of the court is amply sufficient to pass the ownership without any conveyance ; and the document executed by the officer is only convenient evidence of title.

and therefore without resort to the pressure of a sanction. Thus if I owe you money which I am ready to pay, and you owe the same sum to a third person, the court can secure the performance of your duty by simply annulling these two duties and creating a new one of the same kind between me and your creditor; or, as the transaction is generally described, though I think not quite so correctly, by simply transferring the debt.

834. Probably also the idea of rendering further breaches of the law to a great extent physically impossible, and so securing a sort of rude specified performance, is to some extent involved in transportation, and in the modern practice of substituting long terms of imprisonment, with comparatively mild treatment, for shorter and sharper suffering.

Why the
methods
of civil
procedure
are effective.

835. The more direct enforcement of duties, so far as matters of civil procedure are concerned, is, like the procuring of compensation, left entirely to the control of the party injured, and there are many circumstances which combine to render this mode of proceeding effectual. There is no better way of securing obedience to the law than to give to private individuals an interest in enforcing it. That interest is given at once in all cases of relative duty, by giving to the party who has the right corresponding thereto means, either of enforcing the right, or of obtaining redress when the right is infringed. He at once not only becomes the public prosecutor, but takes upon himself the whole trouble, risk, and expense of prosecution. And this method is found so effectual, that so far as concerns all those violations of right which come within the denomination of civil injuries, the State is able to relieve itself entirely of the trouble of enforcing obedience to the law, beyond the appointing proper officers to perform the duties of the civil courts.

836. The injury to the individual, therefore, though it is never the cause of the action of a court of law, is the occasion of it. And in matters of civil procedure and a few other cases it is not only the occasion of the action, but the exact measure

of it. The whole ostensible object of the proceedings from beginning to end in those cases is not punishment, but redress, and they are fashioned upon the hypothesis that redress alone is the object.

837. From this point of view, therefore, to have a right does not only express the condition of a person towards whom a duty has to be performed, as it would if violations of that duty were only punished and not redressed; but it expresses the condition of a person who can put in motion the whole machinery of courts of law to obtain a private object. If, for instance, injuries to property were followed only by a fine payable to the Crown, or by imprisonment, the compound right which we call ownership would still exist, but it would have no legal importance independently of the duties and obligations to which it corresponds: but when the owner of the property injured is also enabled to claim compensation for the injury, the right assumes a new and important aspect. It is no longer the mere correlative of the primary duties commanding us to abstain from acts injurious to the property of others; it has, as the foundation of a claim for redress, an altogether independent existence, correlative to an obligation to make amends on the part of the delinquent¹.

Secondary aspect of right as foundation of claim for redress.

838. It is obvious enough that none of the consequences of a breach of the law will render it certain that the command which contains the law will be obeyed. If we punish the wrong-doer, or compel him to make redress, we only warn him and others in a significant manner against a repetition of

Imperfect laws.

¹ It is, I apprehend, this combination of a public with a private object which determines the apportionment of costs in civil proceedings. They are borne partly by the public, for the same reason that costs in criminal proceedings are so borne entirely. But I do not see exactly on what principle Bentham (vol. ii. p. 112) would require the government to take upon itself the whole burden of costs in civil proceedings. If so, all notion of giving redress would have to be abandoned, for it is not a duty incumbent upon a government to procure redress for individuals; no government has ever assumed any such function; and to charge upon the public the duty of performing it could hardly be justified. The action of the law would thus be confined to enforcing penalties.

the wrong. If by a transfer of rights we fulfil an obligation, or if by the use of physical force we render a man powerless to repeat an injury, we have only rendered ourselves secure in an individual case; and we must trust to the example to deter others from doing the like. Nothing, therefore, can be more inappropriate than the expression by which some laws are distinguished as perfect, and others as imperfect. All laws are imperfect in the sense that we cannot be sure that they will be obeyed by those on whom they are imposed. On the other hand, a law which has no sanction of any kind, either legal or moral, if that is what is meant, is a thing that I confess myself unable to conceive. Again, a moral law, or a law accompanied by a sanction which is not enforced by a legal tribunal (which is also sometimes said to be what the term is intended to express), is no more imperfect than one which is enforced. If we consider the very rare cases in which the sanctions set by the law, or legal sanctions, come into competition with the sanctions of so-called imperfect obligations, which are the sanctions set by society, and which are commonly called moral sanctions—that is, if we look to cases where the conduct required of us by the law conflicts with that which is expected of us by our neighbours, it would be obviously untrue to imply that the moral sanctions were, as compared with the legal ones, imperfect. There are many men who, upon deliberate choice, in order to gain the approbation of those with whom they are accustomed to associate, would leave unpaid their debts to a tradesman rather than their wagers on a horserace. But this is in reality a wholly distorted view of the subject: the sanctions set by law do for the most part not conflict, but concur with moral sanctions; and every political society depends for its existence in a great measure upon this concurrence. It is this concurrence which has enabled the law to impose sanctions which are sometimes so light as scarcely to be perceptible. Nothing indeed can be more striking than to contrast the habit of obedience to law which prevails in most countries with the slightrness of legal

sanctions—that is, with the smallness both in quantity and intensity of the suffering which the law inflicts in cases of disobedience.

839. Sanctions are divided into the two following kinds. Frequently, indeed most frequently, disobedience to the law is only followed in the first instance by the imposition of a fresh duty. I have disobeyed the law by not attending as a juror when summoned, by driving carelessly in the street, or by not fulfilling my contract; the result in each case is that I am ordered to pay a sum of money. The duty to pay the money is a secondary or sanctioning one, inasmuch as it exists for the sake of enforcing a primary duty. But it is only a duty, and requires therefore a further sanction to enforce it, if it be disobeyed.

Intermediate and ultimate sanctions.

840. Sanctions which consist merely in liability to a duty, that is, which result from a command to a man to do something, under pain of incurring certain further consequences if he do not, I will call *intermediate* sanctions. Sanctions which consist not of liability to a duty, but of liability to some other evil which it is supposed the party would be desirous to avoid, I will call *ultimate* sanctions.

841. The ultimate sanctions of all primary duties, whether the breach of them be what is usually called a civil injury, or what is usually called a crime, are the same. They are of three kinds—bodily pain including death, imprisonment, and forfeiture. This division of sanctions is not scientifically correct; for imprisonment itself is a kind of bodily pain, and also an instrument for inflicting it: though it is generally something more; loss of liberty being regarded by most men as an evil, independently of any bodily suffering. The division is, however, convenient. Forfeiture is of two kinds; it may consist in the simple annulment of all or some of those rights which the party has, or it may consist in depriving him of all or some of those rights which are in their nature transferable, and transferring them to another.

Ultimate sanctions, the same for civil injuries and crimes.

Whether the right be simply annulled, or transferred to another, the sanction consists in the forfeiture only.

Applica-
tion of
sanctions
by courts
of civil
procedure.

842. The application of sanctions has varied considerably at different times, but there is a good deal of similarity in the views which prevail at present in regard to them in most civilised countries, especially in courts of civil procedure. These courts, shaping their proceedings, as they ostensibly do, for the sole purpose of giving redress to the party injured, always select that form of sanction which will best accomplish that purpose: sometimes they order the party delinquent to make compensation in money; sometimes, where the wrong done is the keeping the rightful claimant out of possession, they restore the possession, using force if necessary for the purpose; sometimes they proceed by way of restitution—that is to say, creating, destroying, or transferring rights, duties, and obligations, for the purpose of putting the parties as nearly as possible in the same position as if the wrong had not been done. In the first two of these cases, keeping only the sanction in view, and disregarding the remedy, we should find that the order of the court results in the imposition of an obligation, that is, the application of an intermediate sanction, or in forfeiture, that is, the application of an ultimate sanction. The process of restitution consists partly of the imposition of an ultimate sanction in the shape of forfeiture, and partly of the specific enforcement of obligations.

Courts of civil procedure never, in the first instance, apply the ultimate sanction of imprisonment, and they have no power to inflict bodily pain in any other form than that of simple detention. Even this power has recently been very largely curtailed in England by what is called the abolition of imprisonment for debt¹.

¹ See the statute 32 & 33 Victoria, chap. lxii, by which the imprisonment for debt in purely civil matters is wholly done away with, except in cases where the court, being satisfied that the debtor has means to pay, makes a special order for payment, which the debtor disobeys.

843. I have already said that the only sanction of many duties is the liability to make amends for the damage caused to an individual by their breach ; and in a very large number of such cases the only form in which compensation can be given is by an order for the payment of a sum of money by the delinquent to the party injured. But since the passing of the last-mentioned act, no person, except in very special cases, can be arrested or imprisoned for making default in the payment of a sum of money. For all this class of cases, therefore, the only ultimate sanction is forfeiture. Moreover, forfeiture, when resorted to as an ultimate sanction of an order to pay money by way of compensation, has always been confined by us to the forfeiture of such rights as may be seized and sold, so as to produce the money and satisfy this secondary duty. And it is not an unimportant reflection that we thus arrive at an ultimate sanction of a very limited kind ; and one which entirely depends on the possession by the delinquent of rights of a particular nature. In other words, as against a pauper there is no sanction at all.

Slightness of sanctions actually in use.

844. When the breach of the primary duty is the subject of criminal procedure, and is called a crime, or an offence, it is customary to apply the ultimate sanction at once, by ordering the guilty person to suffer death, or imprisonment, either alone or accompanied by some kind of physical inconvenience, such as whipping or hard labour. Sometimes, however, an alternative is still left of escaping from the ultimate sanction by the payment of a sum of money, which is then usually called a fine ; and in cases which are of a mixed character, neither decidedly civil nor decidedly criminal, a fine is generally imposed as an alternative intermediate sanction.

Application of sanctions in criminal courts.

845. In India sanctions are substantially the same as in England, except that imprisonment for debt still exists ; but under conditions which make it so onerous to the creditor, that it is very little resorted to.

In India.

846. The courts of civil procedure in the United States

In other countries.

and in France also proceed upon principles almost precisely the same. And in both countries, in that very large class of cases where the proceedings result in an order for the payment of money by way of compensation, it has been found possible to dispense with the ultimate sanction of imprisonment, and to rely entirely on the apparently slender sanction of forfeiture¹.

Tendency
of modern
legisla-
tion.

847. If we consider the general tendency of modern legislation in regard to sanctions, we perceive, on the one hand, that our ideas on the subject of compensation for injuries have rapidly developed. But, concurrently, we observe that in the absence of certain characteristics, which are generally also the characteristics of crime, such as fraud or intentional wrong, the ultimate sanction of imprisonment has in civil matters almost disappeared. Moreover, whilst we are continually enlarging the field of crime, we are at the same time endeavouring to mitigate the sufferings of punishment in all respects except their duration. I am also inclined to think that (possibly as a result of these changes) the disgrace of a criminal conviction, which is an important part of the punishment, has diminished, especially in certain cases—such, for example, as the conviction of directors of a company for fraud. We are perhaps approaching a considerable readjustment of the respective domains of civil and criminal law.

¹ See Powell's *Analysis of American Law*, Philadelphia, 1870, Book iii. chap. ix. sect. 3, and the *Loi de 22 Juin*, 1870, in the *Collection des Lois*, vol. lxvii. p. 165, where there is a very interesting account of the discussions which preceded the abolition of imprisonment for debt in France.

CHAPTER XX.

PROCEDURE.

848. PROCEDURE is the term used to express the action of courts of law. Courts of law are persons or bodies of persons delegated by the sovereign authority to perform the function of enforcing the duties and obligations which have been created tacitly, or expressly, by this authority in the form of law. Procedure is the action of courts of law.

849. I have already pointed out how this function generally divides itself into the several parts of ascertaining the precise nature of the duties which have been imposed by the sovereign authority; of further ascertaining which of these have been broken; and of applying the sanction appropriate to the breach. I have further pointed out that though this penal function is the only one for which courts of law exist, they do in fact perform it in some cases by ostensibly exercising a function which is merely remedial; the court taking action ostensibly, not for the purpose of punishing disobedience to the law, but for the purpose of giving redress¹. Parts of the proceeding penal or remedial.

850. This cardinal difference between the ostensible functions of courts of law corresponds generally, but not exactly, with the distinction of courts into courts of civil and courts of criminal procedure. Though the ultimate object of all courts is the same, the civil court generally professes Civil and criminal courts.

¹ See Chapter XIX.

only to give redress, and the criminal court only to inflict punishment.

851. The general scheme of procedure in each court also corresponds with the general object which each professes to pursue. In the civil court the person who makes the complaint is the party who has suffered by the breach of the law. He is also *dominus litis*, and is responsible for the conduct of the proceedings, and in a great measure for the expenses of them, inasmuch as they are treated as though they were carried on entirely for his benefit. He may abandon them at any moment, or he may settle the dispute privately, if he thinks fit. On the other hand, in the criminal court, though it has been the custom in England hitherto to trust the conduct of prosecutions to some extent to private individuals, the prosecutor is in no way responsible for, nor has he control over, the proceedings.

Suits will not generally lie for mere declarations without wrong.

852. It is a general rule that courts of law will not move unless some duty or obligation is broken. Very often parties assert rights which they do not as yet wish to exercise, or repudiate obligations which they are not at the moment called upon to perform. And so disputes arise without any wrong having actually taken place: and very often parties are desirous, from reasons of convenience, to come into court and get their rights declared at once without waiting for the expected breach. No doubt there may be strong reasons of convenience in favour of such a course. The intention to do an act would, in a vast majority of cases, be abandoned, if it was known to be illegal; or, what comes to the same thing, if it was known that a court of law would treat it as illegal. The consideration which counterbalances these reasons of convenience is the fear that too much opportunity might be given to persons of litigious character to bring useless and vexatious suits against their neighbours, and thus the number of suits would be greatly multiplied. And since the burden and expense of litigation always fall to some extent on the public at large, this burden and expense cannot be increased

solely with reference to considerations of private convenience. The rule, therefore, is generally adhered to, that there must be some actual wrong done before the court will set itself in motion. An exception is, however, generally made where there is a reasonable and well-grounded expectation that a breach of duty or obligation will be committed, and that no proper redress can be had, if it does take place. There is, indeed, one class of cases in England in which parties are allowed to come and ask simply for the opinion of the court upon their rights and duties: but this privilege is confined to trustees, who, by a peculiarity of our law, may always to some extent cast upon the court the duty which has been undertaken by themselves. This being so, it is more economical to allow them to consult the court, as it were, and to require the court to give them its advice; for a refusal might only result in a far greater burden.

853. The respective schemes of procedure are fashioned according to these views. In all courts the party who seeks to set the court in motion has, except in very special cases such as are mentioned above, to make a statement which, whether it be called a complaint, an indictment, a charge, a demand, a bill of complaint, a plaint, or a declaration, is in fact an assertion that a wrong has been committed; including also generally, in the civil courts, a claim for redress. This is invariable: and there is also invariably a defined mode of bringing before the court the person whose conduct is complained of, in order that his answer may be heard. But there is a good deal of variety, and some peculiarity, in the modes of doing this. Sometimes the party against whom the complaint is made is summoned; that is, he receives a notice that his attendance is required in court; sometimes he is arrested and brought there; sometimes he is required actually to appear in court; sometimes only to put in his answer or defence. Moreover the practice varies as to the exact time of making the statement of the particular wrong complained of. Sometimes it is made simultaneously with the first summons to the

Com-
mence-
ment of
proceed-
ings.

Appear-
ance.

other party to come into court and answer it. Sometimes the summons into court takes place first, and the complaint is made afterwards. And these varieties are to be found not only in different countries, but in the same. For some crimes, both in England and in India, a party may be arrested and brought into court; in others the proceedings can only commence by a summons, followed by a warrant in case of non-appearance. In England, in what used to be called the Common Law Courts of civil procedure, the theory was that nothing could be done in the first instance beyond bringing the party complained against into court, and that no further proceedings were possible, until this had been accomplished. And though the rigour of this rule is now relaxed, it is still so much respected, that the appearance (as it is called) of the defendant is always feigned to have taken place, even when the proceedings go on without it. When both parties have appeared, or are supposed to have appeared, they make their respective statements answering and replying to each other till both sides have nothing more to say. In the Court of Chancery, on the other hand, the plaintiff has always commenced proceedings by stating what he had to complain of, and delivering a copy of the statement to the defendant; at the same time requiring him to appear and answer it. And the rule requiring the defendant to appear, before the case could proceed further, then applied, as in the Common Law Courts, but was avoided by the same fiction. The curiously indirect methods which were at one time in use both in Courts of Common Law and in Courts of Chancery, for compelling a defendant to take the step of appearing in court, and some expressions which are used regarding it, seem to point to something voluntary in the submission of the defendant to the jurisdiction of the court. This is analogous to what has been pointed out by Sir Henry Maine in what he considers the most ancient judicial proceeding known to us—the *legis actio sacramenti* of the Romans, where the form of the proceeding appears to treat the judge rather as a private arbitrator

chosen by the parties than as a public officer of justice. But in modern times this appearance of voluntary submission has no significance ¹.

854. It is impossible here to do more than point out the leading characteristics of the procedure, by which the complaint of one side and the defence of the other are submitted to the judgment of the tribunal. The rules upon this subject, called by us the rules of pleading, are generally elaborate, and very often highly artificial, and even capricious; but I will notice one or two leading distinctions of principle in the practice of different courts respecting it.

855. In every dispute the two principal questions to be determined are, (1) what are the duties and obligations which exist between the parties? (2) have they, or any of them, been broken? The first of these questions depends ultimately of course upon the law, but proximately it may depend on whether certain events have happened, on the happening of which duties and obligations will arise; such, for instance, as whether a contract has been made; or a will executed; or a marriage solemnised. The second depends on whether certain events have happened. Hence in every case which comes into court the questions to be determined resolve themselves into questions of law and questions of fact; and it is the object of the rules of pleading in English courts, and analogous rules in all other courts, to put into a more or less precise form the various questions of law and fact which have to be determined ².

Pleadings.
Issues of
law and
fact, in
civil cases.

856. The difficulty of understanding the procedure in the English courts, where the trial takes place before a jury, arises from the very wide difference which prevails between the theory and the practice based upon it. Theoretically the

¹ See Maine's *Ancient Law* (first ed.), p. 375. Under the last new rules (those of 1883) a summons may in simple cases contain a statement of the claim, and any further statement of it is then dispensed with.

² I follow here the usual language. I have shown above that the so-called questions of fact sometimes involve questions of conduct, but these fall within the province of the jury (see *supra*, sect. 25).

parties to a suit heard before a jury are required to work out the questions of law and questions of fact into distinct issues, as they are called ; and though at the present day this is but imperfectly done, yet, as these questions have to be decided by different tribunals—issues of law by the court and issues of fact by the jury—one would suppose that to whatever extent this has not been done before, the deficiency must necessarily be supplied at the hearing. The judge, one would think, would have first to completely separate, and then to decide the questions of law ; after which he would ask the jury to give their opinion on the facts. To a very considerable extent this is done. But then it is only done in a verbal address to the jury of which there is no regular record ; the observations on the facts are so mingled with the directions on the law, that it is sometimes very difficult to distinguish them ; and what is more important still, there is no regular mode of ascertaining whether or no the jury accept the law as the judge lays it down ; because the ordinary form of finding is, not on specific questions, but for the plaintiff, or for the defendant, in general terms¹. Indeed, were it considered necessary to keep the functions of the court and the jury as completely severed in practice as they are in theory, the proceedings at a trial at *Nisi Prius* would have to undergo a very considerable change. I even think it very doubtful whether with such a severance of functions the jury system could be as successfully worked as it is at present. The present success of that system depends almost entirely on the friendly co-operation and mutual good understanding between the court and the jury, which have been, in England, so happily established : and these it would be extremely difficult to preserve, if such discussions as to their respective duties

¹ The jury cannot be compelled to find particular facts, or even to find the affirmative, or negative, on particular issues, though they are generally willing to do so, if requested. But it has been always recognised as their undoubted privilege to decline finding any other than a general verdict, and they have been known to exercise it. See a case reported in the third volume of Adolphus and Ellis' Reports, p. 506.

were admitted as would be necessary to keep each within the strict limits of its own particular functions.

857. A very little observation of what passes daily in courts of justice will show that there is a similar indistinctness in the line drawn between law and fact in the proceedings subsequent to the verdict of the jury, when the tribunal, whilst professing to keep within the province of pure law, really enters into considerations which it seems impossible to call legal: as, for instance, whether a verdict is against the weight of the evidence. And though a legal form is given to another frequent consideration—namely, whether there is any evidence to support the verdict—yet I think it is impossible to doubt that under this form what is really very often considered is, whether the jury have drawn the right inference from the facts laid before them¹.

858. In criminal cases no attempt is made to separate the questions of law and fact prior to the hearing; and though the functions of judge and jury are in criminal cases theoretically separated, there is still the same absence of all security that this separation should be practically observed; and the result in a criminal trial, even more than in a civil one, is in reality arrived at rather by a co-operation of judge and jury throughout the trial, than by the simultaneous exercise of two entirely independent functions. In criminal cases.

859. The proceedings where there is no jury are a good deal simpler. There it is not necessary to separate the issues of law and fact. The parties are not required to make this separation at any stage of the pleadings antecedent to the hearing, and there is nothing in the nature of the proceedings at the hearing which renders it then necessary, inasmuch as the presiding judges decide both law and fact simultaneously. And in practice the separation is only so far made as is found to be convenient for understanding the case, and so far as the judges may make it, when in conformity with In courts of Chancery.

¹ Supra, sect. 25.

the tradition of the courts, they disclose to the litigants their reasons in detail for arriving at this conclusion.

In India
and other
countries.

860. The provisions of the Indian Code of Civil Procedure on this subject are very peculiar and stringent. They require that the judge should settle the questions of law and fact upon which the parties are at issue in every case before the hearing commences. The French Code requires no settlement of issues, but there are very strict rules which require that the judgment should contain a specific statement of the points of law and of fact which have arisen, with the determination of each. The requirements of the Italian Code, and I believe also of the Spanish Law, are similar. Of all these methods, that provided for by the Indian Code is the most laborious and complete. It contemplates that every possible issue which can arise should be raised prospectively; a much greater burden than is thrown upon a judge by the French Code, who has only to declare what issues have actually come into dispute; and in fact this duty has been found so onerous that the courts in India have almost universally neglected it. And it appears, from the rules recently made by the judges in England, that English lawyers have come to the conclusion, that it may be safely left to the discretion of the court how far, and when, and with what precision, the issues shall be ascertained; and that so far as this has to be done, it should be done, if possible, by agreement of the parties¹. But the rules are silent upon the question of separating the findings on these several issues, so that it may be inferred that the practice of not doing so, as it at present exists in England, is not disapproved.

861¹. It is not possible yet to form any judgment as to how the modern system of allowing an infinite variety of questions to be tossed in disorder before the court will answer the ends of justice. One thing is certain, that this disorder must be reduced to order at some point in the trial. The

¹ What follows has appeared in an article in the *Law Magazine*, N.S. vol. iii. p. 393.

object of all 'rules of pleading,' as they are called, was to produce that order. As a learned German Jurist has pointed out in some very practical and sensible observations upon legal procedure generally, no part of that procedure has been spoken of with greater contempt by mankind at large than rules of pleading. The term 'special pleading' has become a bye-word in the English language, and the whole system has been swept away as worthless. Yet the objects which these rules had in view were not only desirable, but such as it is absolutely necessary to secure. Unless a judge contents himself with simply saying that he decides in favour of one party or the other (and practically no judge can do this), he must break up the complex contentions of the parties into the various simple questions which are involved. To the performance of this task modern procedure for the most part affords no assistance whatever; it is left entirely to the intellectual capacity of the judge, with such assistance as the parties through their counsel choose to render him¹. In the early Roman procedure, the judges being laymen, and there being but scanty opportunity of obtaining legal assistance for the court, there was a rigorous rule of 'one suit one question,' binding both upon the plaintiff and the defendant. Our rules of pleading, though never quite so strict, did remove many difficulties out of the way of the judges by bringing out the issues to be tried. These difficulties are now let loose upon the court. It may be that the rules of pleading were, on the whole, an impediment to the administration of justice. It may be that they had become distorted, and sometimes defeated the very object they had in view. But the object was a useful one, and the burden laid upon judges is enhanced by their abolition. It is frequently taken for granted that by simplifying (as it is called) the rules of pleading you have relieved the parties of a merely useless legal technicality. When you have allowed the plaintiff to lay before the court in his own language the tale of all his

¹ See Ihering, *Geist. d. Röm. Rechts.*, part iii. p. 15 sqq.

wrongs, and have permitted the defendant to state not only all that he has to say in way of reply, but to bring all his countercharges, a triumph of simplicity is supposed to have been achieved. It is too soon to count upon this as a certainty. It may turn out that the investigation is only made more costly and more difficult. It may be that the whole case is never before the court at any one time: that the aspect of a case constantly changes in the course of the investigation: that appeals are increased: and that, on the whole, with a greater expenditure of money, time, and labour, a satisfactory result is less seldom obtained.

Decree
often only
declaratory in
form.

862. When the case has been heard and the decision given, the result, so far as the judgment is not merely declaratory, is to impose either an ultimate or an intermediate sanction. In civil cases this will generally be an intermediate sanction only, and, for the reasons explained above, generally in the form of an order to make compensation or restitution. But though the courts lay down as a general rule that they will not move unless there has been some wrong committed, the real object of many suits is not to compel redress, either in the shape of compensation or in the shape of restitution. The real dispute is as to the rights of the respective parties, and a declaration on this point having been once procured, it is frequently well known to all concerned in the litigation that every one will do what is required, either from motives of honesty, or because the means of compulsion are sufficiently proximate and certain to make it useless further to resist. For this reason we constantly find that the result of litigation is a mere declaration.

Restitu-
tion.

863. Again, wherever it is possible, the Court of Chancery, which alone has power to do so, gives redress by way of restitution rather than by way of compensation. Now the principle of restitution is, as far as possible, to treat the rights, duties, and obligations of all parties as being at that moment, and as having been all along, such as they would have been, had nothing taken place to interfere with them. Thus, when

a sale of property is set aside on account of fraud, every effort is made to put the parties precisely in the same position as if the fraud had not taken place. The fraudulent conveyance is declared void. The property is treated as never having ceased to belong to the party who was induced by the fraud to part with it. All the profits are declared to belong to him, and so forth. The court only resorts to a money payment by way of compensation when it is compelled to do so. But it would not always be easy to say whether, in very strictness, the court in making a decree of this kind, was depriving the defendant of a right, or merely declaring the existing rights of the plaintiff; that is to say, whether it was applying an ultimate sanction, or not applying a sanction at all. Nor is there any reason in practice for distinguishing between the performance of these operations. On the contrary, it rather serves as a guide to the measure of relief, to keep up the idea (even though it be fictitious) that the rights of the parties are only being declared. We have, therefore, another reason why in form, at any rate, the final decree in a suit is often only declaratory.

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